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Research References

A.L.R. Library

A.L.R. Index, Due Process
A.L.R. Index, Fifth Amendment
A.L.R. Index, Military Services
A.L.R. Index, Selective Service
West's A.L.R. Digest, Constitutional Law 4242, 4243, 4244, 4245(1) to 4245(4), 4246, 4247, 4248

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16D C.J.S. Constitutional Law § 2026

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Constitutional Law
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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2026. Due process in the military, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4242

Congress is subject to the limitations of the Due Process Clause when acting in the area of military affairs, but the tests and limitations to be applied may differ because of the military context.

Congress is subject to the limitations of the Due Process Clause when legislating in the area of military affairs,[1] but the tests and limitations to be applied may differ because of the military context.[2] An individual does not cease to be a person within the protection of the Fifth Amendment[3] because he or she has joined the nation's armed forces and has taken the oath to support the Federal Constitution with his or her life if need be.[4] The guaranty of due process in the Fifth Amendment makes no exception in the case of such persons[5] although even where a person within the military enjoys the protection of due process, he or she is not necessarily entitled to the same standard of fundamental fairness as civilians.[6] Servicemembers do not enjoy due process protections above and beyond the panoply of rights provided to them by plain text of the Constitution, the Uniform Code of Military Justice, and the Manual for Courts-Martial.[7]

In general, courts tread lightly on the military domain, with scrupulous regard for the power and authority of the military establishment to govern its own affairs within the broad confines of constitutional due process.[8] Generally, the armed services are required, under minimum due process standards, to give notice of proceedings affecting military personnel,[9] although, in some instances, the failure to give notice and hold a hearing before various determinations involving military personnel are made does not deny due process,[10] and, in the absence of the deprivation of some entitlement or significant right, the due process protections are not operative.[11] The failure of the military to follow its own regulations may, however, constitute a deprivation of due process[12] though not every failure of the military to follow its own regulations is a per se due process violation; rather, only those that implicate a protected liberty or property interest are.[13]

To pass muster on the due process challenge of "void for vagueness," it is not required that military regulations possess the same precision and specificity of standards as required of criminal statutes.[14]

Promotion.

There exists no property or liberty interest protected by due process in a military promotion per se.[15] Navy directive regarding the translation of trait averages into promotion recommendations was insufficiently mandatory to give active duty naval officer a claim of entitlement to promotion protected by the Due Process Clause.[16]

Change of status.

A status review hearing must comply with the due process standards.[17]

Deprivation of medical care.

A claim by a person in military service that he or she is unconstitutionally deprived of medical care is cognizable through the Due Process Clause.[18]

Restricting access to military installations and facilities.

The commanding officer of a military installation has the right to summarily exclude civilians from the installation without violating the requirements of the Due Process Clause.[19] Even if a civilian has no constitutional right to be in a military establishment in the first place, however, such person cannot be deprived of liberty or property in violation of the Due Process Clause by the withdrawal of the permission for such person to enter the establishment.[20]

Privileges and immunities.

The Due Process Clause of the Fifth Amendment does not prohibit American officials from exercising historical immunities of military forces in refusing to consent to the jurisdiction of a foreign administrative court.[21]

Re-enlistment.

The due process provision of the Fifth Amendment does not provide substantive protection for reenlistment in the military.[22]

Civil relief.

Officers who deprive an officer of liberty without due process are subject to a damage action under the Fifth Amendment.[23]

Footnotes

1 U.S.—Witt v. Department of Air Force, 527 F.3d 806 (9th Cir. 2008); Sanford v. U.S., 567 F. Supp. 2d 114 (D.D.C. 2008), aff'd, 586 F.3d 28 (D.C. Cir. 2009).

2 U.S.—Rostker v. Goldberg, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981).

3 U.S. Const. Amend. V.

4 U.S.—U. S. ex rel. Innes v. Hiatt, 141 F.2d 664 (C.C.A. 3d Cir. 1944).

Protected right

U.S.—Suro v. Llenza, 531 F. Supp. 1094 (D.P.R. 1982).

5 U.S.—U.S. v. Miller, 261 F. Supp. 442 (D. Del. 1966).

Arbitrary curtailment of rights of certain persons

U.S.—Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973).

6 U.S.—Vance v. U.S., 434 F. Supp. 826 (N.D. Tex. 1977), aff'd, 565 F.2d 1214 (5th Cir. 1977).

Rationale

Lesser degree of due process afforded to members of military is not based on an ongoing war or needs of a drafted army but rather develops from view that courts are not equipped to determine specific procedures proper to decision making of military.

U.S.—Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir. 1978).

7 U.S.—U.S. v. Vazquez, 72 M.J. 13 (C.A.A.F. 2013).

8 U.S.—Spadone v. McHugh, 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).

9 U.S.—Phillips v. U.S., 910 F. Supp. 101 (E.D. N.Y. 1996); McDonald v. McLucas, 371 F. Supp. 831 (S.D. N.Y. 1974), judgment aff'd, 419 U.S. 987, 95 S. Ct. 297, 42 L. Ed. 2d 261 (1974).

10 **Measures against drug abuse**

U.S.—Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

Distribution of publications on military post

U.S.—Schneider v. Laird, 453 F.2d 345 (10th Cir. 1972).

11 **Clemency proceedings**

U.S.—Vincent v. Schlesinger, 388 F. Supp. 370 (D.D.C. 1975).

12 U.S.—Charlton v. Donley, 846 F. Supp. 2d 76 (D.D.C. 2012); Parrish v. Brownlee, 335 F. Supp. 2d 661 (E.D. N.C. 2004).

13 U.S.—Brown v. McHugh, 972 F. Supp. 2d 58 (D.D.C. 2013) (retired officer's claim that an adverse Officer Evaluation Report in his service record essentially ended his career and forced him to retire did not set forth a property interest that triggered constitutional due process protections).

14 U.S.—U.S. v. Floyd, 477 F.2d 217 (10th Cir. 1973).

15 U.S.—Roberts v. U.S., 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).

16 U.S.—Roberts v. U.S., 883 F. Supp. 2d 56 (D.D.C. 2012), judgment aff'd, 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).

17 **"Missing in action" changed to "deceased" or "killed in action"**

U.S.—Darr v. Carter, 487 F. Supp. 526 (E.D. Ark. 1980), judgment aff'd, 640 F.2d 163 (8th Cir. 1981).

18 U.S.—Cushing v. Tetter, 478 F. Supp. 960 (D.R.I. 1979).

19 U.S.—Government of Canal Zone v. Brooks, 427 F.2d 346 (5th Cir. 1970).

No due process requirement to afford hearing at or before time barred

U.S.—U.S. v. Albertini, 783 F.2d 1484 (9th Cir. 1986).

20 U.S.—Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

21 U.S.—Dostal v. Haig, 652 F.2d 173 (D.C. Cir. 1981).

22 U.S.—Williams v. U.S., 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

No property interest in reenlistment

U.S.—Mangino v. Department of Army, 818 F. Supp. 1432 (D. Kan. 1993), aff'd, 17 F.3d 1437 (10th Cir. 1994).

A.L.R. Library

Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

23 **Hospitalization without hearing**

U.S.—Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2027. Service academies and cadets

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4247

The service academies are subject to the Fifth Amendment, and cadets must be accorded due process before separation.

The service academies are subject to the Fifth Amendment,[1] and cadets must be accorded due process before separation.[2] It is not, however, required that procedural due process be afforded at every stage of developing disciplinary action.[3] Thus, due process safeguards do not apply at the honor committee level with respect to the military academy honor code and system since such committee decisions have no effect other than to initiate de novo proceedings before a board of officers.[4] What is required is that an adequate hearing be held before the final act of disenrollment.[5] Accordingly, before a cadet can properly be dismissed or separated from his or her service academy, the cadet must be given a full and fair hearing, notice of the specific charges against him or her, and fair opportunity to appear, to present his or her defense, and to present statements, evidence, and witnesses on his or her behalf.[6] Though a cadet facing a disciplinary sanction of disenrollment has a due process right to the presence of counsel at a disciplinary hearing, such counsel can only advise and consult but cannot actively participate in the hearing.[7] However, it has also been held that a cadet's inability to receive legal counsel prior to and during an honor board proceeding and honor board's refusal to provide him with his own expert witness does not violate due process, absent a

regulation requiring board to provide cadet with legal counsel or with expert witness.[8] A military proceeding conducted within these bounds of procedural due process is proper and immune from constitutional infirmity.[9]

Propriety of expulsion as sole remedy.

The sole penalty of expulsion from an academy for a violation of the cadet honor code is, while severe, reasonable and not violative of due process.[10]

Footnotes

1 U.S. Const. Amend. V.

2 U.S.—Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975).
Degree of due process
U.S.—Love v. Hidalgo, 508 F. Supp. 177 (D. Md. 1981).

3 U.S.—Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975).

4 U.S.—Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975).

5 U.S.—Phillips v. U.S., 910 F. Supp. 101 (E.D. N.Y. 1996).
Academy subject to requirements of due process in disciplining cadets
U.S.—Tully v. Orr, 608 F. Supp. 1222, 25 Ed. Law Rep. 269 (E.D. N.Y. 1985).

6 U.S.—Crowley v. U.S. Merchant Marine Academy, 985 F. Supp. 292 (E.D. N.Y. 1997).
Due process established
Where the record shows that the cadet received notice that he was deemed to have failed the Honors Mentorship Program, and that the cadet used his opportunity to present a defense before he was disenrolled, due process is not denied
U.S.—Spadone v. McHugh, 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).
Presumption of correctness of delinquency reports
U.S.—Brown v. Knowlton, 370 F. Supp. 1119 (S.D. N.Y. 1974), aff'd, 505 F.2d 727 (2d Cir. 1974).

7 U.S.—Crowley v. U.S. Merchant Marine Academy, 985 F. Supp. 292 (E.D. N.Y. 1997).

8 U.S.—Charlton v. Donley, 846 F. Supp. 2d 76 (D.D.C. 2012).

9 U.S.—Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975).

10 U.S.—Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975).

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16D C.J.S. Constitutional Law § 2028

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2028. Appearance and uniform of military personnel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4242

Regulations relating to the appearance of military personnel must comply with the requirements of due process.

Regulations relating to the appearance of military personnel must comply with the requirements of the Due Process Clause.[1] Military regulations requiring members of the ready reserve to present a neat and soldierly appearance are not so vague and uncertain as to amount to a denial of due process of law.[2] Nothing in the Due Process Clause, however, mandates the adoption of a unisex grooming code by the armed services.[3] Additionally, while regulations with respect to the wearing of wigs by the military may deny due process of law,[4] various other regulations, such as those relating to the permissible length of hair,[5] do not deny due process of law.

Footnotes

1 U.S.—Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973).
Separation for violation servicemember not notified of

U.S.—Crane v. Secretary of Army, 92 F. Supp. 2d 155 (W.D. N.Y. 2000).

2 U.S.—Anderson v. Laird, 437 F.2d 912 (7th Cir. 1971).

3 U.S.—Gadberry v. Schlesinger, 419 F. Supp. 949 (E.D. Va. 1976), aff'd, 562 F.2d 46 (4th Cir. 1977).

4 U.S.—Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973).

5 **Interference with profession as actor**

U.S.—Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971).

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A. Armed Services

1. In General

§ 2029. Civilian military employees

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4242

In order to invoke constitutional due process protections with respect to a pretermination hearing, a civilian employee of a military department must have a sufficient liberty or property interest in the employment.

In order to invoke constitutional due process protections with respect to a hearing prior to the dismissal of a civilian employee of a military department, the employee must have a sufficient liberty or property interest in the employment.[1] A procedure followed in discharging a civilian employee comports with due process requirements where the employee is given notice of the charges, an opportunity to respond to such charges, and an evidentiary hearing even though the hearing is held after the termination of employment.[2] Where the dismissal of a civilian employee calls into question the employee's good name and integrity, due process entitles the employee to an opportunity to clear his or her name through a posttermination trial-type hearing.[3]

Failure to give a civilian employee advance notice of all the charges brought against him or her is a denial of such employee's due process right to a decision in compliance with statutory and regulatory procedures.[4] Additionally, a civilian employee is entitled to a hearing before an impartial hearing officer on appeal of his or her termination since the commanding officer who discharged such civilian cannot decide such appeal consistent with the requirements of due process.[5]

Debarring employee from entering military base.

A former civilian military base employee who was debarred from the base had no Fifth Amendment right to notice and a hearing before being debarred nor had a liberty interest requiring due process protection.[6]

Footnotes

1 U.S.—Elkin v. Roudebush, 564 F.2d 810 (8th Cir. 1977).
Probationary employee
U.S.—Curtin v. Henderson, 514 F. Supp. 16 (E.D. N.Y. 1980).

2 U.S.—Davis v. Vandiver, 494 F.2d 830 (5th Cir. 1974).

3 U.S.—Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975).

4 U.S.—Albert v. Chafee, 571 F.2d 1063 (9th Cir. 1977).

5 U.S.—Baye v. Wade, 416 F. Supp. 1147 (E.D. La. 1976).

6 U.S.—Serrano Medina v. U.S., 709 F.2d 104, 36 Fed. R. Serv. 2d 554 (1st Cir. 1983).

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16D C.J.S. Constitutional Law § 2030

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2030. Pay, allowances, and family benefits of military personnel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4244

The pay and allowances of military personnel must be made in a manner which is not violative of due process.

Statutes providing aid or relief to families and dependents of military personnel must comply with the due process requirements.[1] Statutes dealing with retirement pay must similarly comply with due process[2] though military retirement pay can be prospectively altered without offending due process.[3] However, an Army major facing involuntary separation has no constitutionally-protected property interest in continued military service or employment benefits that came with military service, precluding her due process claims.[4]

Footnotes

1 **Medical benefits**
Statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining medical and dental benefits but that spouses of female

members are not dependents unless they are, in fact, dependent for over one-half of their support violates the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

U.S.—Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

Different dependency criteria

A statutory provision establishing, with respect to allowances, different dependency criteria for spouses of male and female military personnel, solely for administrative convenience, violates the Due Process Clause of the Fifth Amendment insofar as it requires a female to prove the dependency of her husband while not requiring such proof with respect to the spouse of a male.

U.S.—Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

Missing status

Next of kin of American service personnel carried on missing status while on active duty have constitutionally protectible property interests at stake in continuation of entitlements granted to them under statutes relating to payments to missing persons.

U.S.—McDonald v. McLucas, 371 F. Supp. 831 (S.D. N.Y. 1974), judgment aff'd, 419 U.S. 987, 95 S. Ct. 297, 42 L. Ed. 2d 261 (1974).

2 U.S.—Puglisi v. U. S., 215 Ct. Cl. 86, 564 F.2d 403 (1977).

3 U.S.—Schrader v. U.S., 20 Cl. Ct. 161, 1990 WL 48681 (1990).

4 U.S.—Smith v. Harvey, 541 F. Supp. 2d 8 (D.D.C. 2008).

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16D C.J.S. Constitutional Law § 2031

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2031. Veterans' benefits

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4244

The regulation of veterans' benefits must generally comply with the requirements of due process.

The regulation of veterans' benefits,[1] and pension benefits of surviving spouses of veterans,[2] as well as proceedings in which Veterans Affairs decides whether claimants are eligible for veterans' benefits,[3] must generally comply with the requirements of due process, though a veteran's pension benefit is not such a fundamental right that it requires special constitutional protection for due process purposes.[4] Statutes dealing with educational assistance allowance to eligible veterans must, therefore, generally comply with the requirements of due process[5] though the Due Process Clause of the Fifth Amendment[6] does not prohibit Congress from restricting the educational courses for which veterans' benefits are available without including identical course limitations in other federal educational assistance programs.[7] Additionally, the exclusion of conscientious objectors who perform alternative civilian service from the educational assistance program under a veterans' benefit statute is not violative of due process on the ground that it is a vindictive and harsh policy which has the purpose to punish conscientious objectors.[8]

A veteran has a constitutionally protected property interest in entitlement to veterans disability benefits,[9] but a protectable property interest in such disability benefits extends only so far as the law creates it.[10] While veterans and veterans' surviving spouses are generally entitled, pursuant to the Due Process Clause, to notice and a pretermination hearing before benefits may be terminated or reduced,[11] veterans do not have a protected property or liberty interest in a future award of disability benefits,[12] and thus, the delay of the Department of Veterans' Affairs' in processing a veteran's claims for disability benefits does not violate such veteran's due process rights.[13] Additionally, a former armed services member who might qualify for potential future veterans' benefits does not have a due process property interest in the expectation of those benefits.[14]

Nonadversarial procedures at the Department of Veterans Affairs Regional Office level for adjudicating veterans' disability claims are sufficient to satisfy due process because subpoena power, discovery, predecision hearings, and the presence of paid attorneys would transform the VA's system of benefits administration into an adversarial system that would tend to reflect the rigorous system of civil litigation that Congress plainly intended to preclude.[15]

The due process right to the effective assistance of counsel does not apply to proceedings before the Court of Appeals for Veterans Claims.[16]

A veterans' benefits statute, which imposes a limit on attorney's fees for attorneys representing veterans under laws administered by the Department of Veterans' Affairs, does not deny due process.[17] Additionally, due process does not entitle a veteran to notice from the Board of Veterans Appeals of the right to appeal to the Court of Veterans Appeals.[18]

CUMULATIVE SUPPLEMENT

Cases:

Board of Veterans' Appeal did not deny due process to veteran in its denial of veteran's request for earlier effective dates for service-related conditions; veteran's claim that Board withheld probative medical documents was unsupported by record and veteran conceded that most of documents listed in motion were not relevant to issues on appeal, veteran failed to identify any missing relevant documents that Board failed to consider, and record showed that Department of Veterans Affairs made efforts to provide veteran with documents he sought. U.S. Const. Amend. 5. Bray v. Wilkie, 839 Fed. Appx. 446 (Fed. Cir. 2020).

Blind war veteran was not given opportunity for meaningful hearing before his Federal Employees Retirement Systems (FERS) disability benefits were terminated by Office of Personnel Management (OPM), as required by Fifth Amendment Due Process clause, where veteran was informed by government that his request for reconsideration of cancellation of benefits would be denied even before OPM considered it. U. S. Const. Amend. 5. Minney v. United States Office of Personnel Management, 130 F. Supp. 3d 225 (D.D.C. 2015).

[END OF SUPPLEMENT]

Footnotes

1 **Statutory destruction of withheld benefits**
U.S.—de Rodulfa v. U.S., 461 F.2d 1240, 18 A.L.R. Fed. 890 (D.C. Cir. 1972).

2 U.S.—Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975).

3 U.S.—Sprinkle v. Shinseki, 733 F.3d 1180 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 2834, 189 L. Ed. 2d 786 (2014).

4 U.S.—Latham v. Brown, 11 F.3d 1070 (Fed. Cir. 1993).

A.L.R. Library

Deprivation of Due Process in Connection with Veteran's Right to Disability, Medical, or Mental Health Benefits, Treatment, or Services, 83 A.L.R. Fed. 2d 133.

5 **Property right**

U.S.—Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980).

Hearing on educational assistance as satisfying due process

U.S.—Celano v. Shinseki, 350 Fed. Appx. 442 (Fed. Cir. 2009).

6 U.S. Const. Amend. V.

7 U.S.—Cleland v. National College of Business, 435 U.S. 213, 98 S. Ct. 1024, 55 L. Ed. 2d 225 (1978).

8 U.S.—Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974).

9 U.S.—Clennan v. Shinseki, 26 Vet. App. 144 (2013).

Veterans' benefits are a protected property interest under the Fifth Amendment

U.S.—Guillory v. Shinseki, 603 F.3d 981 (Fed. Cir. 2010)

10 U.S.—Morris v. Shinseki, 26 Vet. App. 494 (2014).

11 U.S.—Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975).

12 U.S.—Jaskot v. Principi, 58 Fed. Appx. 839 (Fed. Cir. 2002).

13 U.S.—Woznick v. Shinseki, 492 Fed. Appx. 100 (Fed. Cir. 2012); Jaskot v. Principi, 58 Fed. Appx. 839 (Fed. Cir. 2002).

14 U.S.—Rudo v. McHugh, 931 F. Supp. 2d 132 (D.D.C. 2013).

15 U.S.—Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 83 A.L.R. Fed. 2d 537 (9th Cir. 2012), cert. denied, 133 S. Ct. 840, 184 L. Ed. 2d 653 (2013).

16 U.S.—Pitts v. Shinseki, 700 F.3d 1279 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 2856, 186 L. Ed. 2d 910 (2013).

17 U.S.—Dyer v. Walters, 646 F. Supp. 791 (E.D. Mo. 1986).

18 U.S.—Machado v. Derwinski, 928 F.2d 389 (Fed. Cir. 1991) (overruled on other grounds by, Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998)).

End of Document

16D C.J.S. Constitutional Law § 2032

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

2. Active or Reserve Duty

§ 2032. Due process rights of active servicemembers and reservists

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4242, 4248

Reservists, who have voluntarily subjected themselves to the jurisdiction of the military by enlisting, are in a class distinct from inducted servicemembers with respect to due process rights.

While reservists, who have voluntarily subjected themselves to the jurisdiction of the military by enlisting, are in a class distinct from inducted servicemembers with respect to due process rights,[1] the failure of the reserve to follow its own regulations generally constitutes a deprivation of due process.[2] Where, however, the military does not violate its own regulations by maintaining an officer's status as a reservist prior to the order calling him or her to active duty, such officer is not deprived of a protectable liberty interest, for purposes of due process, when called to active duty in time of national emergency.[3]

Where a reservist's application for exemption is on the basis of community essentiality and hardship, the military review of such application must comport with procedural due process standards.[4] It is not necessary, in such instance, that there be a full-blown adversary hearing.[5] The military is not, however, required to delineate substantive guidelines as to the basis upon which

it will grant delays or exemptions from the obligation for reserve officers to report for active duty.[6] Thus, a reserve officer is not deprived of due process because of the failure to promulgate such guidelines.[7]

Footnotes

1 U.S.—Rohe v. Froehlke, 368 F. Supp. 114 (E.D. N.Y. 1973), judgment rev'd on other grounds, 500 F.2d 113 (2d Cir. 1974).

A.L.R. Library

Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

2 U.S.—Myers v. Parkinson, 398 F. Supp. 727 (E.D. Wis. 1975).

3 **Failure of reservist to resign commission upon completion of obligation**

U.S.—Parrish v. Brownlee, 335 F. Supp. 2d 661 (E.D. N.C. 2004).

4 U.S.—Miller v. Claytor, 466 F. Supp. 938 (N.D. Cal. 1979).

5 U.S.—Miller v. Claytor, 466 F. Supp. 938 (N.D. Cal. 1979).

6 U.S.—Miller v. Claytor, 466 F. Supp. 938 (N.D. Cal. 1979).

As to the application of due process to deferments and exemptions from military service, generally, see §§ 2034 to 2036.

7 U.S.—Miller v. Claytor, 466 F. Supp. 938 (N.D. Cal. 1979).

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16D C.J.S. Constitutional Law § 2033

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

2. Active or Reserve Duty

§ 2033. Activation of member of reserves for unsatisfactory participation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4242, 4248

The military regulations governing involuntary activation of a member of the ready reserve must provide procedural safeguards required by due process.

The military regulations governing involuntary activation of a member of the ready reserve provide procedural safeguards required by due process where the procedure permits a reservist to take the matter up with his or her unit commander and also permits an appeal in which the reservist has an opportunity to explain the facts pertinent to his or her case which the reservist feels were not fully considered.[1] Pursuant to such procedure, there is no due process right to a full adversary hearing prior to the administrative activation of a reservist.[2]

The military must follow its own regulations governing the procedural requirements pertaining to notification of unsatisfactory performance in reserve training programs, and the military's failure to provide a reservist with proper notification of unsatisfactory performance before involuntarily activating him or her is a violation of due process.[3] Additionally, where regulations provide that a reservist can be excused from a drill under certain circumstances and that, prior to the activation of reservists for unsatisfactory participation, the commandant must have a statement from the reservist justifying, explaining, or

mitigating the charge, failure to afford the reservist an opportunity to present such a statement to a higher military authority constitutes a prejudicial violation of the regulations and thereby deprives the reservist of due process.[4] The fact that the period of active duty to which a reservist is ordered because of the excessive number of absences from mandatory drills extends beyond the termination of his or her period of enlistment does not violate his or her Fifth Amendment[5] rights.[6]

Footnotes

1 U.S.—Peters v. Secretary of Army, 448 F. Supp. 254 (E.D. Wis. 1978).
Determination of due process
U.S.—Antonuk v. U.S., 445 F.2d 592 (6th Cir. 1971).
Matter submitted beyond time limit for appeal
U.S.—Keister v. Resor, 343 F. Supp. 203 (E.D. Pa. 1971), order aff'd, 462 F.2d 471 (3d Cir. 1972).

2 U.S.—Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir. 1978).

3 U.S.—Febus Nevarez v. Schlesinger, 440 F. Supp. 741 (D.P.R. 1977).

4 U.S.—Dellaverson v. Laird, 351 F. Supp. 134 (S.D. Cal. 1972).

5 U.S. Const. Amend. V.

6 U.S.—Karpinski v. Resor, 419 F.2d 531 (3d Cir. 1969).
A.L.R. Library
Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

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16D C.J.S. Constitutional Law § 2034

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2034. Due process in administration of military deferments and exemptions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Due process requires that, once Congress has granted exemptions from military duty, any conditions imposed on such exemptions be reasonable.

Due process requires that, once the Congress has granted exemptions from military duty, any conditions imposed on such exemptions be reasonable.[1] A registrant who seeks an exemption from military duty on the basis that he or she is being detained on a criminal charge and is, therefore, entitled to a classification based on moral standards, standards which, in the end result, benefit the community, is not denied due process in the refusal of such classification.[2] Even where a local draft board fails to follow selective service regulations in handling a registrant's claim for deferment, if the claim is frivolous and there is an absence of prejudice resulting from the procedures followed, there is no denial of due process.[3]

Failure of a draft board to consider a registrant's request for a deferment constitutes a denial of due process.[4] The denial of a deferment to which a registrant is entitled also violates the registrant's right to due process.[5] Due process does not require that a local board warn a registrant that he or she bears the burden of substantiating his or her claim to an exemption.[6]

Footnotes

1 U.S.—U.S. v. Thorn, 317 F. Supp. 389 (E.D. La. 1970).

2 U.S.—U.S. v. Holohan, 390 F. Supp. 310 (S.D. N.Y. 1975).

3 U.S.—U.S. v. Hahn, 381 F. Supp. 1311 (E.D. Mich. 1974).

4 U.S.—U.S. v. Raymond, 352 F. Supp. 1220 (E.D. Wis. 1973).

5 U.S.—Walsh v. Local Bd. No. 10, Mount Vernon, N. Y., 305 F. Supp. 1274 (S.D. N.Y. 1969) (disapproved of on other grounds by, U.S. v. Cook, 505 F.2d 1124 (2d Cir. 1974)).

6 U.S.—U.S. v. Brooks, 422 F.2d 365 (5th Cir. 1970).

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16D C.J.S. Constitutional Law § 2035

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2035. Due process rights of conscientious objectors

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Due process requires that a registrant seeking a forum in which to assert its conscientious objection claim be given reasonable guidance with which to identify that forum.

Due process requires that a registrant seeking a forum in which to assert its conscientious objection claim be given reasonable guidance with which to identify that forum.[1] Thus, where a registrant makes it known to its local draft board the desire to claim conscientious objector status, it is a denial of due process for the board to fail to provide the registrant the means to adequately present the claim.[2] The failure of a draft board to consider a claim of conscientious objection is not, however, a denial of due process where the registrant fails properly to notify the board of his or her claim,[3] but due process is denied if a timely filed conscientious objector claim is not considered at all by a local board.[4]

A registrant who is refused an opportunity to file a conscientious objector form is similarly denied due process.[5] A draft board is not, however, required to send a registrant a form for conscientious objection unless the registrant requests one though the board's failure to do so is not a denial of due process.[6] A registrant who is furnished with a conscientious objector form and is informed

that the local board will answer any questions involving it but fails to file such form cannot claim that he or she has been denied due process in an administrative proceedings.[7] Where a local draft board finds that defendant's claim for conscientious objector classification is not sincere, and sets forth a rational basis, grounded upon the record and defendant's appearance at an interview, sufficient to provide the basis for a meaningful administrative and judicial review, the requirements of due process are satisfied.[8]

Footnotes

1 U.S.—U.S. v. Shockley, 492 F.2d 353 (9th Cir. 1974).

2 U.S.—Bucher v. Selective Service System, Local Boards Nos. 2, etc., 421 F.2d 24 (3d Cir. 1970).

3 U.S.—U.S. v. McKinney, 427 F.2d 449 (6th Cir. 1970).

4 U.S.—U.S. v. Weaver, 336 F. Supp. 558 (E.D. Pa. 1972).

5 U.S.—U.S. v. Moyer, 307 F. Supp. 613 (S.D. N.Y. 1969).

6 U.S.—U.S. v. Wendt, 452 F.2d 679 (9th Cir. 1971).

7 U.S.—U.S. v. Kircher, 443 F.2d 46 (9th Cir. 1971).

8 U.S.—U.S. v. Aull, 341 F. Supp. 389 (S.D. N.Y. 1972), judgment aff'd, 469 F.2d 151 (2d Cir. 1972).

16D C.J.S. Constitutional Law § 2036

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2036. Due process rights of conscientious objectors—Civilian work

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Conscription of conscientious objectors for work of national importance without compensation, pursuant to a statute exempting conscientious objectors from military service, does not constitute a denial of due process.

Conscription of conscientious objectors for work of national importance without compensation, pursuant to a statute exempting conscientious objectors from military service, does not constitute a denial of due process.[1] Registrants classified conscientious objectors available for civilian work who do not report for physical examination and who do not explain to their local draft board the reason for their nonappearance cannot complain that they have been denied due process because they are ordered to report for civilian work without being given an armed forces physical examination.[2]

Well-defined administrative rules and regulations, articulating standards of required performance and providing for appropriate notice of violations of such standards, must be adopted before a registrant may properly be prosecuted for failure to perform civilian service properly.[3] Due process, therefore, requires that a registrant have the opportunity to know the charges and claims made against him or her and be afforded the opportunity to rebut them.[4] Due process is not denied where the draft board follows its procedures[5] and is guided by an approved list of acceptable civilian employment.[6] There is no provision in the selective

service regulations providing for the transfer of a registrant's work assignment hearing to a more convenient board, and a board's refusal to transfer such hearing is not a denial of due process.[7]

Footnotes

1 U.S.—U.S. v. Harris, 446 F.2d 129 (7th Cir. 1971).

2 U.S.—U.S. v. Dicks, 392 F.2d 524 (4th Cir. 1968).

3 U.S.—U.S. v. Cook, 445 F.2d 883 (8th Cir. 1971).

4 U.S.—U.S. v. Cook, 445 F.2d 883 (8th Cir. 1971).

5 U.S.—U.S. v. Ronne, 414 F.2d 1340 (9th Cir. 1969).

6 **Suggestions submitted by applicant**
U.S.—U.S. v. Wilson, 436 F.2d 972 (9th Cir. 1971).

7 U.S.—U.S. v. Wright, 474 F.2d 853 (9th Cir. 1973).

16D C.J.S. Constitutional Law § 2037

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2037. Due process in selective service or draft proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Selective service board proceedings are quasi-judicial and must conform to the basic principles of due process of law.

The composition of a local draft or selective service board must not be such so as to deny a registrant due process of law,[1] but the fact that blacks are under-represented or excluded from a such board does not necessarily deprive a registrant of due process.[2]

A failure by the selective service to comply with its own regulations is a ground for a finding of denial of due process where prejudice can be shown.[3] A procedural irregularity which does not result in prejudice to the registrant is not, however, a denial of due process.[4] Additionally, the Due Process Clause does not automatically raise procedural regulations for draft boards to the status of constitutional requirements.[5] A registrant who is, however, actually misled by the acts of the Selective Service System and is thus precluded from exercising a right available to him or her under that system is deprived of due process.[6] A court will not deem a violation of a regulation, as applied to third persons, a deprivation of due process as to a registrant unless it is apparent that favoritism to another or discrimination against the registrant was intended or unless the violation is so

flagrant and serious that, whether intended or not, concern for fair and efficient administration justifies the sanction of voiding an induction adversely affected by the violation.[7]

Footnotes

1 U.S.—U.S. v. Dale, 304 F. Supp. 1278 (D.N.H. 1969).

2 U.S.—U.S. v. Lemons, 480 F.2d 1214 (5th Cir. 1973).

3 U.S.—U.S. v. Hahn, 381 F. Supp. 1311 (E.D. Mich. 1974).

4 U.S.—U.S. v. Primous, 420 F.2d 33 (7th Cir. 1970).

5 U.S.—U.S. v. Norman, 301 F. Supp. 53 (M.D. Tenn. 1968), judgment aff'd, 413 F.2d 789 (6th Cir. 1969).

6 U.S.—U.S. v. Jacques, 463 F.2d 653 (1st Cir. 1972).

7 U.S.—U.S. v. King, 474 F.2d 402 (1st Cir. 1973).

A.L.R. Library

Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases, 178 A.L.R. Fed. 25.

Sex discrimination in United States Armed Forces, 56 A.L.R. Fed. 850.

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16D C.J.S. Constitutional Law § 2038

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2038. Draft board hearing, evidence, and determination

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

A registrant asserting a claim before a local draft board is entitled to a fair hearing as a part of due process of law.

A registrant asserting a claim before a local draft board is entitled to a hearing as a part of due process of law, and, where the registrant has been accorded a fair hearing, he or she may not urge the denial of due process in this respect.[1] A registrant is not denied due process by the failure of a local board to inform him or her, in advance, of the purpose of a courtesy hearing or by the board's failure to furnish him or her a copy of the summary of the hearing prepared by the local board clerk.[2] The denial to a registrant of the right to be represented by counsel also does not constitute a denial of due process of law.[3] Additionally, procedural due process is not violated by a draft board's failure to appoint a government appeal agent to advise a registrant on selective service matters where notice is given of the availability and identity of the appeal agent.[4] The action of a draft board in misleading a registrant as to his or her appeal rights by failing to properly inform the registrant as to the identity of the governmental appeal agent, whose assistance the registrant seeks and desires, does, on the other hand, constitute a denial of due process.[5]

A registrant's evidence in support of his or her claimed classification must be considered thoroughly and without prejudice.[6] If the classification of a registrant is not warranted by the facts before the board or agency, due process of law is denied.[7]

In some instances, a registrant cannot be denied an opportunity to know and rebut adverse evidence in his or her selective service file before the local draft board and the appeal board, and an authoritative refusal to give him or her that opportunity constitutes a denial of procedural due process.[8] Thus, the registrant must be furnished with a copy of the recommendation of the Department of Justice that exemption be denied and with an opportunity to reply to such recommendation.[9] The failure or refusal of the Department of Justice to show a registrant a report of the Federal Bureau of Investigation on his or her claim for exemption as a conscientious objector,[10] or to disclose to the registrant the names and addresses of informants interviewed by the Federal Bureau of Investigation,[11] does not, however, violate the principle of due process. Additionally, in some instances, it is deemed sufficient to meet the requirement of due process that a registrant be given an opportunity to obtain a report containing adverse information by requesting it.[12] Where, in such instances, the registrant makes no such request, he or she is not denied due process because a hearing officer fails to inform him or her of the contents of the report.[13] There is no denial of due process where the material to which a registrant has not been permitted access is not adverse or prejudicial to him or her.[14]

Footnotes

1 U.S.—U.S. v. Dal Santo, 205 F.2d 429 (7th Cir. 1953).

2 U.S.—U.S. v. Watson, 442 F.2d 1273 (8th Cir. 1971).

3 U.S.—Levine v. Selective Service Local Bd. No. 18, Stamford, Conn., 458 F.2d 1281 (2d Cir. 1972).

Rationale

U.S.—Cassidy v. U.S., 304 F. Supp. 864 (E.D. Mo. 1969), judgment aff'd, 428 F.2d 585 (8th Cir. 1970).

No*Miranda* warnings required

U.S.—Storey v. U.S., 370 F.2d 255 (9th Cir. 1966).

4 U.S.—U.S. v. Rogers, 454 F.2d 601 (7th Cir. 1971).

5 U.S.—U.S. v. Fisher, 442 F.2d 109 (7th Cir. 1971).

6 U.S.—U.S. v. Peebles, 220 F.2d 114 (7th Cir. 1955).

As to the application of due process to the classification of persons for military service, generally, see §§ 2040 to 2044.

Opportunity to present information

U.S.—Davis v. U.S., 199 F.2d 689 (6th Cir. 1952).

7 U.S.—In re Schmidt, 68 F. Supp. 765 (N.D. Cal. 1946).

8 U.S.—U.S. v. Saunders, 467 F.2d 675 (4th Cir. 1972).

Memorandum

U.S.—Murray v. Blatchford, 307 F. Supp. 1038 (D.R.I. 1969).

FBI report

Selective service registrant was denied due process of law where FBI report concerning certain political activities was placed in his or her selective service file and was before appeal board without registrant's knowledge and registrant was afforded no opportunity to explain or contradict the information contained in the report.

U.S.—U.S. v. Cabbage, 430 F.2d 1037 (6th Cir. 1970).

9 U.S.—Bradley v. U.S., 348 U.S. 967, 75 S. Ct. 532, 99 L. Ed. 754 (1955); Gonzales v. U.S., 348 U.S. 407, 75 S. Ct. 409, 99 L. Ed. 467 (1955); Simmons v. U.S., 348 U.S. 397, 75 S. Ct. 397, 99 L. Ed. 453 (1955).

10 U.S.—U.S. v. Nugent, 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953).

11 U.S.—Imboden v. U.S., 194 F.2d 508 (6th Cir. 1952).

12 U.S.—Kent v. U.S., 207 F.2d 234 (9th Cir. 1953).

13 U.S.—Kent v. U.S., 207 F.2d 234 (9th Cir. 1953).

Effect that file open to registrant

U.S.—Gonzales v. U.S., 364 U.S. 59, 80 S. Ct. 1554, 4 L. Ed. 2d 1569 (1960).

14 U.S.—U.S. v. Wright, 474 F.2d 853 (9th Cir. 1973).

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16D C.J.S. Constitutional Law § 2039

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2039. Due process and military induction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Due process requires that an individual ordered to report for induction be called in the proper order and in strict compliance with pertinent regulations.

Due process requires that an individual ordered to report for induction be called in the proper order and in strict compliance with pertinent regulations.[1] A general ground which may be asserted to avoid conviction for refusal to submit to induction into the armed forces is that there is a denial of due process in local draft board procedures in handling a case.[2]

A registrant who is deprived of liberty by means of an induction order issued by an unlawfully constituted selective service board is denied due process.[3] Where a local draft board fails to afford a registrant due process, its action ordering him or her to report for induction is invalid.[4] There is also a denial of due process where a local board issues an induction order after failing to determine whether a registrant is entitled to an exemption on the ground of his or her secularly based moral code.[5]

A registrant is not denied due process by the failure of his or her local draft board to notify the registrant of the postponement of his or her induction.[6] Additionally, a postponement beyond that permissible by regulation of a registrant's induction does not constitute a denial of due process where such delays in the registrant's induction are the result, at least in part, from his or her own actions and are for the registrant's benefit.[7]

Footnotes

1 U.S.—U.S. v. Johnson, 314 F. Supp. 88 (D.N.H. 1970).

2 U.S.—U.S. v. Weaver, 336 F. Supp. 558 (E.D. Pa. 1972).

3 U.S.—U.S. v. Williams, 317 F. Supp. 1363 (E.D. Pa. 1970).

4 U.S.—U.S. v. Levin, 326 F. Supp. 1069 (D. Minn. 1971).

5 U.S.—U.S. v. Rink, 430 F.2d 647 (7th Cir. 1970).
As to the application of due process to deferments and exemptions from military service, generally, see §§ 2034 to 2036.

6 U.S.—U.S. v. Smith, 291 F. Supp. 63 (D.N.H. 1968).

7 U.S.—U.S. v. Winer, 456 F.2d 566 (3d Cir. 1972).

16D C.J.S. Constitutional Law § 2040

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2040. Due process in classifying person for military service

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

The classification of persons for military service must be done in accordance with the requirements of due process.

The classification of persons for military service must be done in accordance with the requirements of due process.[1] Abuse of a draft board's discretion in classifying a registrant must be clearly shown before the courts will declare the board's action void as a denial of due process, and where there is any rational basis of fact for the classification, the board's action will be sustained.[2] The local board's mailing to a registrant of printed forms informing him or her of his or her right to a personal appearance and to appeal a classification conforms to constitutional requirements of due process.[3] Additionally, the government's regulatory scheme relating to physical examinations to be given to selective service registrants does not offend due process[4] though a failure specifically to warn a registrant that his or her refusal to sign a medical history form constitutes a crime, and to tell such registrant of the penalties involved, deprives the registrant of due process.[5]

Footnotes

1 U.S.—U.S. v. Peach, 391 F. Supp. 777 (E.D. Wis. 1975).

2 U.S.—Ory v. U.S., 206 F.2d 500 (5th Cir. 1953).

3 U.S.—U.S. v. Seeverts, 428 F.2d 467 (8th Cir. 1970).

4 U.S.—U.S. v. Mendoza, 295 F. Supp. 673 (E.D. N.Y. 1969).

5 U.S.—U.S. v. Perkins, 336 F. Supp. 1104 (D.N.H. 1972).

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16D C.J.S. Constitutional Law § 2041

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2041. Reopening military classification and reclassification

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Where a draft board, in denying to reconsider a classification, complies with the procedures for reopening a registrant's classification as set forth by applicable regulations, the registrant is not denied due process.

Where a draft board, in denying reconsideration of a classification, complies with the procedures for reopening a registrant's classification, the registrant is not denied due process.[1] If, however, a board fails to follow required administrative procedures, there is a violation of the registrant's due process rights.[2] A registrant is denied due process by his or her local board where the board fails to afford the registrant the means to adequately present his or her claim for reclassification.[3] It is also a denial of due process for a draft board to prevent an administrative appeal from a refusal to reclassify by casting it in the form of a refusal to reopen.[4]

While there is a failure of due process when a draft board fails to consider any fact that might result in the changing of a registrant's classification, the mere fact that a registrant offers some new information does not require that the board reopen

the registrant's classification and consider it anew.[5] Where, however, a registrant sets out new facts that establish a prima facie case for a new classification, a board must reopen his or her classification to determine whether the registrant is entitled to reclassification, and the board's failure to reopen under these circumstances is a denial of due process.[6] Furthermore, there is a denial of due process of law if the board refuses to reopen a classification even though the registrant has satisfied his or her burden of proof.[7]

Regulations providing that, even where new information is submitted, if the local draft board is of the opinion that such facts, if true, do not justify a change in the registrant's classification, the board does not have to reopen the classification, do not violate due process.[8] In addition, where a registrant, instead of presenting new facts, reiterates assertions he or she has made previously, it is not a denial of procedural due process for the board to refuse to reopen his or her classification[9] and to treat the registrant's proffered information as an appeal of his or her original classification.[10]

Due process does not require that a registrant's request for reclassification be considered and acted upon before a draft board issues its induction order.[11] A registrant is also not denied due process because his or her local draft board, in reviewing the classification of registrants, considers many cases within a short period of time and thus averages a very little time on each case.[12]

Courtesy interview.

A local draft board may grant a courtesy interview to a registrant who requests the reopening of his or her classification, but it is not mandatory that it do so, and the failure to grant such an interview is not a denial of due process.[13]

Notice of reclassification.

The due process requirement that a registrant receive notice of his or her reclassification may be satisfied by actual knowledge from sources other than the receipt of a notice of classification form.[14]

CUMULATIVE SUPPLEMENT

Cases:

Upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells, and so far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. U.S. Const. Amend. 14. Duarte Nursery, Inc. v. California Grape Rootstock Improvement Commission, 239 Cal. App. 4th 1000, 191 Cal. Rptr. 3d 776 (3d Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Hardin, 331 F. Supp. 1112 (D. Colo. 1971).
Absence of provision to review
U.S.—U. S. ex rel. Johnson v. Irby, 438 F.2d 114 (5th Cir. 1971).

2 U.S.—U.S. v. Rundle, 413 F.2d 329 (8th Cir. 1969).
Investigation tantamount to reopening
U.S.—U.S. v. Grier, 415 F.2d 1098 (4th Cir. 1969).

3 U.S.—U.S. v. Turner, 421 F.2d 1251 (3d Cir. 1970).

4 U.S.—U. S. ex rel. Miller v. Eberhardt, 324 F. Supp. 961 (N.D. Ga. 1971).

5 U.S.—U.S. v. Prescott, 301 F. Supp. 1116 (D.N.H. 1969).

6 U.S.—U.S. v. Sanders, 470 F.2d 937 (9th Cir. 1972).
Rationale
U.S.—U.S. v. Miller, 455 F.2d 358 (9th Cir. 1972).

7 U.S.—Brede v. Allen, 311 F. Supp. 599 (N.D. Ohio 1969).

8 U.S.—U.S. v. Dicks, 392 F.2d 524 (4th Cir. 1968).

9 U.S.—U.S. v. Smith, 465 F.2d 388 (8th Cir. 1972).

10 U.S.—U.S. v. Brooks, 298 F. Supp. 254 (W.D. La. 1969), judgment aff'd, 422 F.2d 365 (5th Cir. 1970).

11 As to the application of due process to the reopening of a classification or reclassification after the issuance of an induction order, generally, see § 2042.
Rationale
U.S.—U.S. v. Heigl, 455 F.2d 1256 (7th Cir. 1972).

12 U.S—U.S. v. Thorpe, 368 F. Supp. 322 (E.D. Wis. 1973).

13 U.S.—McLain v. Barstow, 337 F. Supp. 1360 (D. Conn. 1971), order aff'd, 455 F.2d 992 (2d Cir. 1971).

14 U.S.—U.S. v. King, 455 F.2d 345 (1st Cir. 1972).

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16D C.J.S. Constitutional Law § 2042

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2042. Reopening military classification and reclassification—After issuance of induction order

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Due process is generally not denied under applicable rules and regulations providing that a draft board may not reopen a registrant's classification after the issuance of an induction order without a showing of changed circumstances over which the registrant has no control and resulting in a change in his or her status.

Due process is generally not denied under applicable rules or regulations providing that a draft board may not reopen a registrant's classification after the issuance of an induction order without a showing of changed circumstances over which the registrant has no control and resulting in a change in his or her status.[1] Thus, where the alleged hardship,[2] or conscientious beliefs,[3] for which a registrant seeks the reopening of his or her classification predates the order for his or her induction, the board is not required to reopen the registrant's classification. A board must, however, before denying a registrant's request to reopen such classification filed after the issuance of an induction order, as an element of a registrant's due process rights, at least consider the facts presented in a request to reopen.[4] A state selective service director may have, by applicable regulation, the power to require a local draft board to reopen and reconsider a classification, regardless of the prior issuance of an induction order,

and due process requires that the director exert such power by exercising his or her own discretion in determining whether to request a local board to reopen a classification.[5]

Footnotes

1 U.S.—U.S. v. Jercha, 458 F.2d 1340 (9th Cir. 1972).
Hearing not required
U.S.—U.S. v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966).
Necessity for personal interview
U.S.—U.S. v. Brossard, 423 F.2d 711 (9th Cir. 1970).
Subjective misunderstanding of regulations
U.S.—U.S. v. Kline, 354 F. Supp. 931 (M.D. Pa. 1972), aff'd, 474 F.2d 1337 (3d Cir. 1972).

2 U.S.—U. S. ex rel. Johnson v. McBee, 311 F. Supp. 531 (N.D. Ill. 1970).

3 U.S.—U.S. v. Bossi, 444 F.2d 121 (9th Cir. 1971).
Late crystallization of beliefs
U.S.—U.S. v. Stacey, 441 F.2d 508 (9th Cir. 1971).

4 U.S.—U.S. v. Shermeister, 425 F.2d 1362 (7th Cir. 1970).

5 U.S.—U. S. v. Pace, 454 F.2d 351 (9th Cir. 1972).

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16D C.J.S. Constitutional Law § 2043

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2043. Administrative review of military classification

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

An appeal board is required to give the appeal of a registrant who is unsuccessful in obtaining a particular classification such consideration as would satisfy due process requirements.

An appeal board is required to give the appeal of a registrant who is unsuccessful in obtaining a particular classification such consideration as would satisfy due process requirements.[1] It is a violation of due process to deny a registrant an appeal from an original classification.[2]

An appeal board must, before disposing of a registrant's appeal, provide the registrant with a meaningful appeal proceeding, and the failure to do so is a denial of due process.[3] A de novo consideration of a registrant's classification by an appeal board does not, however, cure a denial of procedural due process which deprived a registrant of his or her right to a personal appearance before a draft board.[4]

Footnotes

1 U.S.—U.S. v. Stewart, 478 F.2d 106 (2d Cir. 1973).

Due process not denied

U.S.—Gonzales v. U.S., 364 U.S. 59, 80 S. Ct. 1554, 4 L. Ed. 2d 1569 (1960).

2 U.S.—U.S. v. Davis, 460 F.2d 792 (4th Cir. 1972).

3 U.S.—U.S. v. Wallen, 315 F. Supp. 459 (D. Minn. 1970).

4 U.S.—U. S. ex rel. Vellrath v. Volatile, 308 F. Supp. 1025 (E.D. Pa. 1970).

End of Document

16D C.J.S. Constitutional Law § 2044

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2044. Judicial review of military classification

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4246

Violations of due process in refusing to reopen and reconsider a classification sufficient to warrant relief in the federal courts may occur either when a local or appellate board denies a registrant valuable procedural rights designed for his or her protection, in violation of applicable statutes or regulations, or when there is no basis of fact for the decision and, therefore, no jurisdiction to assign the classification.

Violations of due process in refusing to reopen and reconsider a classification sufficient to warrant relief in the federal courts may occur either when a local or appellate board denies a registrant valuable procedural rights designed for his or her protection, in violation of applicable statutes or regulations, or when there is no basis of fact for the decision and, therefore, no jurisdiction to assign the classification.[1] A statute providing that no judicial review need be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form, does not, however, deny due process of law.[2]

Footnotes

1 U.S.—Kulas v. Laird, 315 F. Supp. 345 (E.D. N.Y. 1970).

2 U.S.—Clark v. Gabriel, 393 U.S. 256, 89 S. Ct. 424, 21 L. Ed. 2d 418 (1968).

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16D C.J.S. Constitutional Law § 2045

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2045. Termination of military service member, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4243

The termination of a military servicemember must be made in accordance with due process requirements.

A fair and impartial process is essential to the due process rights of military personnel faced with discharge from their military service.[1] The termination of a military servicemember must be made in accordance with due process requirements.[2] As there is no right to membership in the armed forces, any rational basis for exclusion will satisfy due process requirements so long as it does not violate protected interests.[3] Inasmuch as a servicemember has no constitutional entitlement in continued service or employment[4] or to remain in the service until the end of the term of his or her enlistment, a servicemember is not deprived of life, liberty, or a property interest as result of his or her discharge pursuant to an involuntary reduction in force order.[5]

A servicemember does not have a liberty interest in his or her good name which affords the servicemember due process rights prior to his or her discharge, absent any showing that the stated reason for the discharge is untrue.[6] Military authorities may not, however, be permitted to return persons to civilian life with an unfair and derogatory characterization of their military service attached without full due process protection.[7] A stigma, such as that occasioned by a dishonorable discharge of service

member, triggers a right to due process considerations that an honorable discharge does not.[8] Thus, the imposition of a stigma on a servicemember in connection with his or her discharge from military service is not permitted without affording the servicemember due process in the nature of notice of the charges against him or her and a fair opportunity to present a defense.[9] To state a claim for deprivation of liberty interest in employment, the plaintiff must show that, in the course of his or her discharge, the military, without notice and an opportunity for plaintiff to be heard, prepared a discharge form which was stigmatizing, false, and published.[10] Where the discharge is honorable and carries no stigma or derogatory connotation, it may be validly accomplished without notice and hearing.[11] Thus, an Enlisted Retention Board process that effects a large-scale reduction in the number of enlisted personnel serving in the Navy and results in honorable discharges of service members does not stigmatize those discharged, so as to trigger a right to due process protections, including notice and hearing.[12]

The denial of an officer's unqualified resignation without a hearing does not deprive him or her of life and liberty without due process.[13] Additionally, a statute denying a promotion or retirement credit for a commissioned military service performed prior to the specified age does not deny due process on the theory that there is no rational basis for treating people differently for purposes of promotion and retirement merely because of age difference.[14] A statute which permits early mandatory retirement of officers under specified conditions is likewise not unconstitutional on the theory that it deprives the officers of a vested property right without due process of law.[15]

Footnotes

1 U.S.—Charlton v. Donley, 846 F. Supp. 2d 76 (D.D.C. 2012).

2 **Administrative discharge procedure**
U.S.—Rew v. Ward, 402 F. Supp. 331 (D.N.M. 1975).

3 U.S.—Helmich v. Nibert, 543 F. Supp. 725 (D. Md. 1982), aff'd, 696 F.2d 990 (4th Cir. 1982).
Effect of race-based goals governing early retirement decisions
U.S.—Christian v. U.S., 46 Fed. Cl. 793 (2000).

4 U.S.—Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000); Spadone v. McHugh, 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).

5 U.S.—Vierrether v. U.S., 27 Fed. Cl. 357 (1992), aff'd, 6 F.3d 786 (Fed. Cir. 1993).
A.L.R. Library
Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

6 U.S.—Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).
Involuntary separation for substandard performance
U.S.—Karr v. Castle, 768 F. Supp. 1087 (D. Del. 1991), order aff'd, 22 F.3d 303 (3d Cir. 1994).

7 U.S.—Canonica v. U.S., 41 Fed. Cl. 516 (1998).

8 U.S.—Anderson v. United States, 111 Fed. Cl. 572 (2013).

9 U.S.—Phillips v. U.S., 910 F. Supp. 101 (E.D. N.Y. 1996).
Due process requirements attach to discharge with stigma attached
U.S.—Weaver v. U.S., 46 Fed. Cl. 69 (2000).
Compulsory process of civilian witnesses beyond jurisdiction of military not required
U.S.—Milas v. U.S., 42 Fed. Cl. 704 (1999), aff'd, 217 F.3d 854 (Fed. Cir. 1999).
Stigma must occur in the course of termination
Statements made by former Air Force employee's supervisors to potential employer regarding employee's separation from Air Force over one year after the employee's termination were too far remote from termination to be considered "in the course of" termination, and thus, due process was not implicated.
U.S.—Minshew v. Donley, 911 F. Supp. 2d 1043 (D. Nev. 2012).

10 U.S.—Flowers v. U.S., 80 Fed. Cl. 201 (2008), aff'd, 321 Fed. Appx. 928 (Fed. Cir. 2008); Sutton v. U.S., 65 Fed. Cl. 800 (2005).

11 U.S.—Lane v. Secretary of Army, 504 F. Supp. 39 (D. Md. 1980), aff'd, 639 F.2d 780 (4th Cir. 1980).

12 U.S.—Allphin v. U.S., 758 F.3d 1336 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 761, 190 L. Ed. 2d 629 (2014); Anderson v. United States, 111 Fed. Cl. 572 (2013).

13 U.S.—Hesse v. Resor, 266 F. Supp. 31 (E.D. Mo. 1966).

14 U.S.—Bensing v. U.S., 551 F.2d 262 (10th Cir. 1977).

15 U.S.—Norman v. U. S., 183 Ct. Cl. 41, 392 F.2d 255 (1968) (disapproved of on other grounds by, Colm v. Kissinger, 406 F. Supp. 1250 (D.D.C. 1975)).

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16D C.J.S. Constitutional Law § 2046

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2046. Termination of military reserve member

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4243

An honorable separation of a reservist does not create any procedural due process requirement.

An honorable separation of a reservist does not create any procedural due process requirement.[1] A delinquent reservist is not denied due process when not officially heard on his or her informal request to his or her commanding officer for discharge from the ready reserve because of the reservist's conscientious objection to war and is not given a hearing before the commanding officer certifies the reservist for priority induction as a delinquent reservist.[2]

Because a heightened deferential review applies to military boards, a finding by the air force board for the correction of military records in a military reservist's administrative discharge hearing that the air force's failure to disclose a letter explaining that an expert witness, who provided evidence regarding the laboratory procedures used in the case, had been removed prior to the hearing from his post as laboratory supervisor due to poor forensic practices, which resulted in a false positive drug test in an unrelated case, is not sufficiently prejudicial to constitute a due process violation.[3]

A student's interest in avoiding disenrollment from the Reserve Officers Training Corps (R.O.T.C.) is analogous to the interest of a cadet in avoiding expulsion from a military academy so as to warrant equivalent due process protection.[4] Due process does not require that a student participating in the R.O.T.C. be represented by counsel at a hearing to determine whether he or she be disenrolled.[5]

CUMULATIVE SUPPLEMENT

Cases:

Even assuming, arguendo, that former Navy Junior Reserve Officers' Training Corps (NJROTC) instructor had protected liberty or property interests in his position, he was afforded all the process he was due when he was decertified by Navy; instructor was given notice of Navy's intent to revoke his certification, instructor received evidence against him, instructor was given opportunity to submit rebuttal evidence, and decision was reviewed by certification boards twice. U.S. Const. Amend. 5. Crooks v. Mabus, 845 F.3d 412 (D.C. Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Helmich v. Nibert, 543 F. Supp. 725 (D. Md. 1982), aff'd, 696 F.2d 990 (4th Cir. 1982).
Expectancy of benefits
U.S.—Coppedge v. Marsh, 532 F. Supp. 423 (D. Kan. 1982).
No liberty nor a property interest in continued active service
U.S.—Burns v. U.S., 9 Cl. Ct. 273 (1985).

2 U.S.—Quaid v. U.S., 386 F.2d 25 (10th Cir. 1967).
As to the application of due process to deferments and exemptions from military service based upon conscientious objector status, generally, see §§ 2035, 2036.

3 U.S.—Williams v. Wynne, 533 F.3d 360 (5th Cir. 2008).

4 U.S.—Kolesa v. Lehman, 534 F. Supp. 590, 3 Ed. Law Rep. 577 (N.D. N.Y. 1982).
As to the due process rights of service academy cadets in avoiding expulsion from a military academy, generally, see § 2027.

5 U.S.—Kolesa v. Lehman, 534 F. Supp. 590, 3 Ed. Law Rep. 577 (N.D. N.Y. 1982).

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A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2047. Discharge for homosexuality

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4243

Law Reviews and Other Periodicals

Developments in the Law: Progress Where You Might Least Expect It: The Military's Repeal of "Don't Ask, Don't Tell," 127 Harv. L. Rev. 1791 (April 2014)

The Don't Ask, Don't Tell Repeal Act of 2010 repealed the policy requiring the separation of servicemembers from the armed forces for certain homosexual or bisexual conduct.

The Don't Ask, Don't Tell Repeal Act of 2010[1] repealed the 1993 policy concerning homosexuality in the armed forces. The Act provided in part that a servicemember of the Armed Forces would be separated, with certain exceptions, from the Armed Forces if the member had engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; if the member

had stated that he or she was a homosexual or bisexual, or words to that effect; or if the member had married or attempted to marry a person known to be of the same biological sex.[2] The Don't Ask, Don't Tell Repeal Act of 2010 was made effective 60 days after the date on which the last of the following occurred: (1) the Secretary of Defense received the report required by the memorandum of the Secretary of Defense; (2) the President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating that: (a) the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action; (b) the Department of Defense has prepared the necessary policies and regulations to exercise the discretion; (c) that the implementation of necessary policies and regulations pursuant to the discretion provided by law is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.[3]

Footnotes

1 Pub. L. No. 111-321, §§ 1, 2.

2 10 U.S.C.A. § 654(b).

3 Pub. L. No. 111-321, § 2(b).

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Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct, 96 A.L.R.5th 391.

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16D C.J.S. Constitutional Law § 2048

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2048. In-service conscientious objector status and discharge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4243

Military regulations with respect to the release or discharge of military personnel on the ground of conscientious objection to military service must comply with standards of fundamental due process.

Military regulations with respect to the release or discharge of military personnel on the ground of conscientious objection to military service must comply with standards of fundamental due process,[1] and where there is such compliance, they do not violate due process.[2] When regulations prescribe specific steps to be taken with respect to procedures involving discharge as a conscientious objector, they must be substantially followed.[3] Failure to follow such procedures constitutes a denial of due process.[4] The denial of a request for a discharge on the ground of conscientious objection is a denial of due process where such denial has no basis in fact.[5] Nevertheless, a cadet who applies for discharge from the army as a conscientious objector is not denied due process by the Army Conscientious Objector Board, which denies the cadet's application where the superintendent of West Point does not issue a recommendation on the application until after the investigating officer and commanding officers made their own decisions, and the cadet is permitted to submit a written rebuttal, and documents withheld from the cadet are not relevant to the decision.[6]

Footnotes

1 U.S.—Finley v. Drew, 337 F. Supp. 76 (E.D. Pa. 1972), order aff'd, 455 F.2d 515 (3d Cir. 1972).

2 U.S.—Turpin v. Resor, 452 F.2d 240 (9th Cir. 1971).

Change of duty station

U.S.—Switkes v. Laird, 316 F. Supp. 358 (S.D. N.Y. 1970).

3 U.S.—Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971).

Effect of substantial compliance

U.S.—Cole v. Clements, 494 F.2d 141 (10th Cir. 1974).

4 U.S.—Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971).

Duty to inform

U.S.—Epstein v. Commanding Officer, 327 F. Supp. 1122 (E.D. Pa. 1971).

Access to case file

U.S.—Violi v. Reese, 343 F. Supp. 462 (E.D. Pa. 1972).

Refusal to release after unanimous recommendation

U.S.—U. S. ex rel. Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969).

5 U.S.—Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968).

6 U.S.—Kanai v. McHugh, 638 F.3d 251 (4th Cir. 2011).

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2049. Courts-martial, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(1)

Court-martial proceedings are subject to due process requirements so that an accused before a court-martial is entitled to due process of law.

Court-martial proceedings are subject to due process requirements[1] so that the accused before a court-martial is entitled to due process of law.[2] To those in the military, the military law is due process.[3] What constitutes due process in a trial by a military tribunal is, therefore, gauged by principles of military law exacted by Congress.[4]

A court-martial may constitutionally be empowered to try and punish military offenses.[5] In the absence of military necessity,[6] the trial of a civilian by a military court lacking judicial power or jurisdiction constitutes a deprivation of due process of law,[7] even where the accused is guilty.[8]

Footnotes

1 U.S.—U.S. v. Graf, 35 M.J. 450 (C.M.A. 1992).
As to the due process requirements of a court-martial proceeding, generally, see §§ 2051 to 2054.

2 U.S.—U.S. v. Witham, 47 M.J. 297 (C.A.A.F. 1997).
Due process does not permit convicting an accused servicemember of an offense with which he has not been charged
U.S.—U.S. v. Girouard, 70 M.J. 5 (C.A.A.F. 2011) (conviction of negligent homicide must be reversed when it is not a lesser included offense to charged offense of murder).
Comparison with civil courts
U.S.—Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966).
Martial law constitutes due process when duly proclaimed by executive
U.S.—Moyer v. Peabody, 212 U.S. 78, 29 S. Ct. 235, 53 L. Ed. 410 (1909).
Protection from injustice
The constitutional guaranty of due process is meaningful enough, and sufficiently adaptable, to protect soldiers, as well as civilians, from crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding the truth through adherence to those basic guaranties which have long been recognized and honored by military, as well as civil, courts.
U.S.—Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

3 U.S.—U.S. ex rel. French v. Weeks, 259 U.S. 326, 42 S. Ct. 505, 66 L. Ed. 965 (1922); Reaves v. Ainsworth, 219 U.S. 296, 31 S. Ct. 230, 55 L. Ed. 225 (1911); Wolf v. Secretary of Defense, 399 F. Supp. 446 (M.D. Pa. 1975).

4 U.S.—Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990).
Military due process neither source of military law nor natural or common-law concept
U.S.—U.S. v. Kelly, 41 M.J. 833 (N.M.C.C.A. 1995), decision set aside on other grounds, 45 M.J. 259 (C.A.A.F. 1996).
Judicial deference to power of Congress regarding military affairs
U.S.—Sanford v. U.S., 567 F. Supp. 2d 114 (D.D.C. 2008), aff'd, 586 F.3d 28 (D.C. Cir. 2009).

5 N.Y.—People ex rel. Underwood v. Daniell, 50 N.Y. 274, 1872 WL 10008 (1872).
Offenses committed during imprisonment
Exercise of the power, long established and recognized, to try military prisoners by courts-martial for offenses committed during the imprisonment does not violate the Fifth Amendment.
U.S.—Kahn v. Anderson, 255 U.S. 1, 41 S. Ct. 224, 65 L. Ed. 469 (1921).

6 U.S.—Ex parte White, 66 F. Supp. 982 (Terr. Haw. 1944).

7 U.S.—Ex parte Spurlock, 66 F. Supp. 997 (Terr. Haw. 1944).

8 U.S.—Ex parte White, 66 F. Supp. 982 (Terr. Haw. 1944).

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2050. Summary courts-martial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(1)

Military personnel who are due to appear before a summary court-martial may be subjected to a loss of liberty or property and, consequently, are entitled to due process of law.

Military personnel who are due to appear before a summary court-martial may be subjected to a loss of liberty or property and, consequently, are entitled to due process of law.[1] The Due Process Clause of the Fifth Amendment[2] does not, however, require that counsel be provided to an accused in a summary court-martial proceeding.[3] Moreover, the fact that the accused, in order to avail himself or herself of the right to counsel, is required to refuse summary court-martial and accept a special court-martial, and, in doing so, exposes himself or herself to the possibility of a more severe punishment than can be imposed at a summary court-martial, does not deny the accused his or her due process rights.[4]

Footnotes

1 U.S.—Middendorf v. Henry, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).

2 U.S. Const. Amend. V.

3 U.S.—Middendorf v. Henry, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).

4 U.S.—Middendorf v. Henry, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).

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16D C.J.S. Constitutional Law § 2051

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2051. Application of due process to court-martial proceedings, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(2)

Although the specific guaranties of the Fifth Amendment relating to criminal prosecutions may not be invoked in instances arising in the armed forces of the United States, an accused before a court-martial is entitled to a fair trial within due process of law concepts.

Although the specific guaranties of the Fifth Amendment[1] relating to criminal prosecutions may not be invoked in instances arising in the armed forces of the United States,[2] an accused before a court-martial is entitled to a fair trial within due process of law concepts.[3] Indeed, in discussing due process in a court-martial proceeding, the Armed Forces Court of Appeals has applied the concepts of due process as to the right of the accused service member to be informed of the nature and cause of the accusation and his or her right to receive fair notice of what he or she is being charged with.[4] Due process does not require that military courts-martial mirror criminal trials[5] but does, rather, guarantee to servicemembers that military procedure will be applied to them in a fundamentally fair way.[6]

Generally, the accused must be given due notice of the charge against him or her[7] and fair notice as to the conduct punishable.[8] The accused also, generally, has a right to counsel, at least where there is a general or special court-martial.[9] Also, the right to the expert assistance of a mitigation specialist in a capital case is determined on a case-by-case basis.[10] Moreover, the accused must be given a fair opportunity to prepare his or her defense.[11] Additionally, the accused has the right to have his or her guilt properly adjudicated[12] by a competent tribunal.[13]

A basic right of military due process is also the right to a judge who appears impartial throughout an accused's court-martial.[14] The lack of a fixed term of office for military judges does not violate the Due Process Clause.[15] In order for an appellant to state a due process claim that a military judge was biased, the appellant must show either that actual bias existed or that an appearance of bias created a conclusive presumption of actual bias.[16]

The fact that the same officer who recommends defendant for a court-martial also approves the conviction and sentence does not deny due process to a defendant.[17] Similarly, provisions assigning multiple roles to the convening authority in the initiation, prosecution, and review of courts-martial does not deny the accused due process of law.[18]

Prosecution in civilian court of discharged servicemember.

Prosecution of a defendant who was discharged from the Army in the civilian justice system under the Military Extraterritorial Jurisdiction Act[19] for crimes committed while deployed overseas as infantry in the Army does not violate the Due Process Clause where the defendant is discharged before Army officials became aware of his involvement in the offense, and thus, his discharge and prosecution in civilian court does not shock the conscience or interfere with rights implicit in the concept of ordered liberty.[20]

Footnotes

1 U.S. Const. Amend. V.

2 U.S.—In re Wrublewski, 71 F. Supp. 143 (N.D. Cal. 1947), judgment aff'd, 166 F.2d 243 (C.C.A. 9th Cir. 1948).

3 U.S.—Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), judgment aff'd, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

4 U.S.—U.S. v. Girouard, 70 M.J. 5 (C.A.A.F. 2011).

5 U.S.—Watson ex rel. Watson v. Beckel, 242 F.3d 1237, 151 Ed. Law Rep. 743 (10th Cir. 2001).

6 U.S.—White v. Humphrey, 212 F.2d 503 (3d Cir. 1954).

7 **Notice of charges fundamental right of due process**
U.S.—Henry v. Department of Navy, 886 F. Supp. 686 (E.D. Ark. 1995), judgment rev'd on other grounds, 77 F.3d 271 (8th Cir. 1996).

8 U.S.—U.S. v. Merritt, 72 M.J. 483 (C.A.A.F. 2013).
Possible sources of "fair notice" that conduct is subject to criminal sanction include federal law, state law, military case law, military custom and usage, and military regulations
U.S.—U.S. v. Warner, 73 M.J. 1 (C.A.A.F. 2013); U.S. v. Pope, 63 M.J. 68 (C.A.A.F. 2006) (fair notice of sexual harassment standards established); United States v. Caporale, 73 M.J. 501 (A.F.C.C.A. 2013).
Other possible sources of fair notice include training and other materials that give context to regulations and explain the differences between permissible and impermissible behavior
U.S.—United States v. Caporale, 73 M.J. 501 (A.F.C.C.A. 2013).
Objective, clearly understood standards of criminality required
U.S.—U.S. v. Cochrane, 60 M.J. 632 (N.M.C.C.A. 2004).

9 U.S.—Middendorf v. Henry, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).
As to the right to counsel in a summary court-martial proceeding, generally, see § 2050.
Qualifications
U.S.—Angle v. Laird, 429 F.2d 892 (10th Cir. 1970).

10 U.S.—U.S. v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005).

11 **Meaningful opportunity to present a complete defense**
U.S.—U.S. v. Mahoney, 58 M.J. 346 (C.A.A.F. 2003).
Accused must be given basic tools necessary to present defense
U.S.—U.S. v. Short, 50 M.J. 370 (C.A.A.F. 1999).

12 **Propriety of conviction by concurrence of only two thirds of voting members of panel**
U.S.—Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986).

13 U.S.—Fly v. U.S., 120 Ct. Cl. 482, 100 F. Supp. 440 (1951).
Constitutional, as well as regulatory, right to fair and impartial panel
U.S.—U.S. v. Downing, 56 M.J. 419 (C.A.A.F. 2002).

14 U.S.—U.S. v. Sowders, 53 M.J. 542 (N.M.C.C.A. 2000).

15 U.S.—Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).

16 U.S.—U.S. v. Barnes, 60 M.J. 950 (N.M.C.C.A. 2005).

17 U.S.—Gross v. U. S., 209 Ct. Cl. 70, 531 F.2d 482 (1976).

18 U.S.—Curry v. Secretary of Army, 439 F. Supp. 261 (D.D.C. 1977), judgment aff'd, 595 F.2d 873 (D.C. Cir. 1979).
Recommendation for trial and review of proceedings
U.S.—Flackman v. Hunter, 75 F. Supp. 871 (D. Kan. 1948).

19 18 U.S.C.A. § 3261.

20 U.S. v. Green, 654 F.3d 637 (6th Cir. 2011).

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2052. Timeliness of filing charges against military servicemember

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(2)

Prejudice to an accused subject to military law is only one prong of a due process speedy trial claim, as there must also be an examination of the reason for the delay, but the prosecution is not required to file charges as soon as probable cause exists.

Prejudice to an accused subject to military law is only one prong of a due process speedy trial claim, as there must also be an examination of the reason for the delay, but the prosecution is not required to file charges as soon as probable cause exists.[1] There may, however, be a due process violation when delay prior to the initiation of charges is incurred in reckless disregard of circumstances known to the prosecution, suggesting that there exists an appreciable risk that such delay will impair the ability of the accused to mount an effective defense.[2]

Footnotes

1 U.S.—U.S. v. Reed, 41 M.J. 449 (C.A.A.F. 1995).

2 U.S.—U.S. v. Sills, 56 M.J. 556 (A.F.C.C.A. 2001), decision set aside on other grounds, 56 M.J. 239 (C.A.A.F. 2002).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2053. Necessity of preliminary hearing under military law

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(2)

A preliminary hearing before the trial of a person subject to military law is not necessary for purposes of due process of law since the Federal Constitution expressly exempts courts-martial from the necessity of indictment by the grand jury.

A preliminary hearing before the trial of a person subject to military law is not necessary for purposes of due process of law[1] since the Federal Constitution expressly exempts courts-martial from the necessity of indictment by the grand jury.[2] Accordingly, a trial of a person subject to military law before a general court-martial, without any preliminary investigation as required, does not deny to the accused due process of law.[3] Where, however, a preliminary hearing before trial by court-martial is held, it must meet all the elements essential to due process in that feature of the proceedings.[4]

Footnotes

1 U.S.—Becker v. Webster, 171 F.2d 762 (2d Cir. 1949).
Necessity of evidentiary hearing

U.S.—Porter v. Richardson, 403 F. Supp. 663 (D. C.Z. 1975).

2 U.S.—Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974).

3 U.S.—Becker v. Webster, 171 F.2d 762 (2d Cir. 1949).

4 U.S.—Talbott v. U.S. ex rel. Toth, 215 F.2d 22 (D.C. Cir. 1954), judgment rev'd on other grounds, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8 (1955).

Cross-examination of witnesses

U.S.—De War v. Hunter, 170 F.2d 993 (10th Cir. 1948).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2054. Conviction and review of court-martial conviction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4245(3), 4245(4)

Military personnel, who have been convicted by a court-martial, may be subjected to a loss of liberty or property and are, consequently, entitled to due process of law with regard to sentencing and review of court-martial proceedings.

Military personnel, who have been convicted by a court-martial, may be subjected to loss of liberty or property and are, consequently, entitled to the due process of law.[1] Review of courts-martial proceedings must also be in accordance with due process of law.[2] Thus, an appellate court may not affirm an included offense on a theory not presented to the trier of fact, as to do so would offend the most basic notions of due process, in that such action violates an accused's right to be heard on the specific charges of which he or she is accused.[3]

Footnotes

1 U.S.—Middendorf v. Henry, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976); Curry v. Secretary of Army, 595 F.2d 873 (D.C. Cir. 1979).

Sentence

U.S.—Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971).

Factors for evaluating if posttrial delay violates accused's due process rights

U.S.—United States v. Bischoff, 2015 WL 894476 (A.F.C.C.A. 2015).

2 **Right to timely review**

U.S.—Diaz v. Judge Advocate General of the Navy, 59 M.J. 34 (C.A.A.F. 2003).

3 U.S.—U.S. v. Riley, 50 M.J. 410 (C.A.A.F. 1999).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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B. Confiscation of Property; Eminent Domain; Taking for Private Use

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Research References

A.L.R. Library

A.L.R. Index, Due Process
A.L.R. Index, Eminent Domain
A.L.R. Index, Fifth Amendment
A.L.R. Index, Seizure
West's A.L.R. Digest, Constitutional Law 3855, 3879, 4057, 4071, 4075 to 4078, 4085, 4090, 4097, 4240, 4289, 4339, 4389, 4446, 4460, 4475, 4496
West's A.L.R. Digest, Eminent Domain 2.24
West's A.L.R. Digest, War and National Emergency 1038, 1039

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XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

a. In General

§ 2055. Confiscation or destruction of property without due process

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4078, 4090, 4097, 4460

As a general rule, the State may not confiscate and destroy property without due process of law.

Neither a court nor the State can simply decide on its own to confiscate an individual's property, without affording the individual due process of law.[1] Indeed, forfeiture or confiscation is a proceeding of a harsh nature and unless accomplished pursuant to the law of the land is in violation of the Fifth Amendment; consequently, confiscation must be accomplished in the manner provided by law.[2] Although an admitted public offense against a constitutional statute may be punished by loss of property,[3] confiscation, which is the taking of private property without just compensation, offends the constitution,[4] and neither a court nor the State can simply decide on its own to confiscate an individual's property without affording the individual due process of law.[5] So, as a general rule, vested property cannot be confiscated by the legislature,[6] or by the courts,[7] and no person can be deprived of his or her property without legal investigation and adjudication.[8] Accordingly, legislation authorizing the confiscation and destruction

of private property without prior notice[9] and an opportunity to be heard is invalid except in cases of overriding necessity.[10] A statute which extinguishes property rights, or which compels their extinction without legal process, is unconstitutional.[11]

A person need not have undisputed title to property to have due process rights protecting against its unlawful confiscation.[12] Possession is sufficient.[13] Therefore, a holder of stolen property has a constitutionally protected interest in the property sufficient to support a claim of violation of due process.[14] Moreover, a property interest in derivative contraband is not extinguished automatically if the property is used unlawfully; therefore, forfeiture of such property is permitted only as authorized by statute and in compliance with the safeguards of due process.[15]

Footnotes

1 Ohio—State v. Walker, 164 Ohio App. 3d 114, 2005-Ohio-5592, 841 N.E.2d 376 (2d Dist. Greene County 2005).

2 Tenn.—State v. Sprunger, 2015 WL 1058222 (Tenn. 2015).

3 N.Y.—Wynehamer v. People, 13 N.Y. 378, 12 How. Pr. 238, 1856 WL 6728 (1856).

Contempt

Statute authorizing seizure of property of citizen witness residing abroad who refuses to respond to subpoena, to satisfy contempt judgment, is not invalid.

U.S.—Blackmer v. U.S., 49 F.2d 523 (App. D.C. 1931), aff'd, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375 (1932).

Contribution

Defendant convicted of conspiring to transport and harbor illegal aliens had no implied right to contribution from other members of conspiracy, and thus, criminal forfeiture judgment against her did not violate her right to due process due to fact that she could not seek contribution.

U.S.—U.S. v. Guillen-Cervantes, 748 F.3d 870 (9th Cir. 2014).

4 U.S.—Dusenbery v. U.S., 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

5 Ohio—State v. Walker, 164 Ohio App. 3d 114, 2005-Ohio-5592, 841 N.E.2d 376 (2d Dist. Greene County 2005).

6 Pa.—Com. v. Perkins, 342 Pa. 529, 21 A.2d 45 (1941), judgment aff'd, 314 U.S. 586, 62 S. Ct. 484, 86 L. Ed. 473 (1942).

Definition of vested right

A right is "vested," and thus protected by the due process guarantees, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.

La.—Church Mut. Ins. Co. v. Dardar, 145 So. 3d 271 (La. 2014).

Confiscatory zoning ordinance

A zoning classification permanently restricting the enjoyment of property to such an extent that it cannot be used for any reasonable purpose goes beyond valid regulation and constitutes a taking without due process, amounting to a practical confiscation.

Conn.—Verrillo v. Zoning Bd. of Appeals of Town of Branford, 155 Conn. App. 657, 111 A.3d 473 (2015).

Restricting use and possession

An individual's vested interest in the use and possession of real estate is a property interest protected by due process.

Mich.—Bonner v. City of Brighton, 495 Mich. 209, 848 N.W.2d 380 (2014), cert. denied, 135 S. Ct. 230, 190 L. Ed. 2d 134 (2014).

7 U.S.—Baldwin v. Schmidt, 106 F. Supp. 135 (W.D. Mo. 1952).

Decree invalidating securities

Where securities are fraudulently obtained, and subsequently declared null and void by court in equitable action, decree invalidating securities does not constitute confiscation of property without due process.

N.Y.—Connolly v. Bell, 286 A.D. 220, 141 N.Y.S.2d 753 (1st Dep't 1955), judgment modified on other grounds, 309 N.Y. 581, 132 N.E.2d 852 (1956).

8 Cal.—People v. Lamonte, 53 Cal. App. 4th 544, 61 Cal. Rptr. 2d 810 (4th Dist. 1997).

Mine claims

Federal Land Policy and Management Act provided claimants, whose property rights were extinguished for failure to comply with requirements for filing mining claims, with all the process that was their constitutional due.

U.S.—U.S. v. Locke, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985).

Disallowance of claim against State

No confiscation shown in action of state commission in disallowing claim against State.

U.S.—Carolina Glass Co. v. State of South Carolina, 240 U.S. 305, 36 S. Ct. 293, 60 L. Ed. 658 (1916).

Unauthorized destruction by state actor

An unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural requirements of Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.

U.S.—Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

Negligent act by state actor

Due Process Clause of Fourteenth Amendment is not implicated by lack of due care of official causing unintended injury to life, liberty, or property.

U.S.—Davidson v. Cannon, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986); Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

9 Cal.—Gonzales v. Superior Court, 180 Cal. App. 3d 1116, 226 Cal. Rptr. 164 (2d Dist. 1986).

10 Del.—Jannuzzio v. Hackett, 32 Del. Ch. 163, 82 A.2d 730 (1951).

Fla.—Campoamor v. State Live Stock Sanitary Bd., 136 Fla. 451, 182 So. 277 (1938).

As to confiscation and destruction of property in cases of overriding necessity, see § 2056.

11 N.Y.—Wynehamer v. People, 13 N.Y. 378, 12 How. Pr. 238, 1856 WL 6728 (1856).

Retroactive legislation

Due process norms limit the government's ability to extinguish vested rights or entitlements through retroactive legislation.

Pa.—Hospital & Healthsystem Ass'n of Pa. v. Com., 621 Pa. 260, 77 A.3d 587 (2013).

12 N.C.—Citifinancial, Inc. v. Messer, 167 N.C. App. 742, 606 S.E.2d 453 (2005).

As to which property is protected by due process against deprivation, generally, see § 1896.

13 U.S.—Abbott v. Latshaw, 164 F.3d 141 (3d Cir. 1998).

N.C.—Citifinancial, Inc. v. Messer, 167 N.C. App. 742, 606 S.E.2d 453 (2005).

Minimum due process requirements

When a possessory interest created by law is at stake, the most basic requirement of procedural due process is notice and an opportunity to be heard.

Conn.—Fleming v. City of Bridgeport, 284 Conn. 502, 935 A.2d 126 (2007).

14 U.S.—Wolfenbarger v. Williams, 774 F.2d 358 (10th Cir. 1985).

15 U.S.—Mims Amusement Co. v. South Carolina Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005).

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XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

a. In General

§ 2056. Confiscation or destruction of property in exercise of police power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4078, 4085, 4090, 4097, 4460

The government's seizure or destruction of property as a result of the legitimate exercise of the police power is not a taking of it without due process.

A person is deprived of property without due process of law when his or her property is confiscated under the guise of police regulation,[1] but seizure or destruction of property as a result of the legitimate exercise of the police power of a state is not a taking of it without due process.[2] The State's exercise of police powers in effecting the forfeiture of citizens' property requires black letter compliance to procedural rules intended to safeguard the due process rights of citizens.[3] It is competent for the legislature to authorize the summary seizure and destruction of things which cannot be put to a lawful use,[4] such as food products unfit for human consumption,[5] and also of things which are obnoxious to the public health or safety,[6] or to the public morals.[7]

A state may summarily seize and destroy, without violating due process, things that, either by the common law or by statute, constitute a public nuisance[8] although a nuisance abatement ordinance allowing a compliance officer to determine the existence

of a nuisance and to abate the nuisance without notice and a hearing violates due process as applied to the summary removal of the owners' vehicles from their property without a hearing to determine whether the vehicles constitute "junk vehicles" under the ordinance.[9] a statute authorizing the summary destruction, as a nuisance, of property not constituting a nuisance per se and not considered such by the legislature except for failure to pay an occupation tax thereon, would be a violation of due process.[10]

The owner of property that has been stolen from him or her, such as a gun, confiscated by the State because it was used in a crime, has a due process right to recover the property before its forfeiture or destruction.[11]

Urgent necessity or imminent danger.

The legislature may authorize the destruction of property in case of urgent necessity[12] or imminent danger.[13] Where the State acts to abate an emergent threat to public safety, postdeprivation process satisfies the Constitution's procedural due process requirement.[14] Property can be destroyed to prevent the advance of a hostile army[15] or as part of the removal or destruction of fire hazards.[16] For the purpose of preventing the spread of disease or pests, the legislature may authorize the destruction of property,[17] such as trees,[18] crops,[19] plants,[20] or animal products.[21]

Footnotes

1 N.J.—Grosso v. Board of Adjustment of Millburn Tp. in Essex County, 137 N.J.L. 630, 61 A.2d 167 (N.J. Sup. Ct. 1948).

2 Haw.—Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999), as amended, (July 13, 1999).
W. Va.—State ex rel. Yanero v. Fox, 163 W. Va. 222, 256 S.E.2d 751 (1979).
Demolition of building
Demolition of dangerous building was an exercise of a borough's police powers rather than a taking without due process of law.
Pa.—Estate of Blose ex rel. Blose v. Borough of Punxsutawney, 889 A.2d 653 (Pa. Commw. Ct. 2005).

3 Tenn.—State v. Sprunger, 2015 WL 1058222 (Tenn. 2015).

4 U.S.—Durant v. Bennett, 54 F.2d 634 (W.D. S.C. 1931).
Or.—Enloe v. Lawson, 146 Or. 621, 31 P.2d 171 (1934).
Items inherently contraband
N.J.—Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).
Drugs
U.S.—U.S. v. Articles of Drug … Wans, 526 F. Supp. 703 (D.P.R. 1981).

5 U.S.—North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908).
Milk not conforming to standards
U.S.—Adams v. City of Milwaukee, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913).

6 Haw.—Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999), as amended, (July 13, 1999).
N.J.—Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).
Childrens' sleepwear
U.S.—U.S. v. Articles of Hazardous Substance, 588 F.2d 39 (4th Cir. 1978).
Guns
Action of state in taking gun belonging to traveler did not deprive property without due process of law.
N.Y.—People v. Perez, 67 Misc. 2d 911, 325 N.Y.S.2d 183 (County Ct. 1971).
Instrumentality adding nothing to general welfare
Instrumentality may be summarily seized and destroyed if it is nothing but civic parasite, adds nothing to general welfare, affords no employment to unemployed, produces nothing, and where nothing is bought, carried home, and used.

U.S.—Holliday v. Governor of State of S.C., 78 F. Supp. 918 (W.D. S.C. 1948), judgment aff'd, 335 U.S. 803, 69 S. Ct. 56, 93 L. Ed. 360 (1948).

7 La.—State v. Ricks, 215 La. 602, 41 So. 2d 232 (1949).

N.J.—Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).

8 Haw.—Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999), as amended, (July 13, 1999).

Destruction without notice or hearing

Things which are by common or statutory law declared to be nuisances per se, or which are by their very nature palpably and indisputably such, may be abated or destroyed by public authorities without notice or hearing.

Iowa—Kistler v. City of Perry, 719 N.W.2d 804 (Iowa 2006).

Judicial declaration unnecessary

City not constitutionally required by due process to obtain judicial declaration that property was in fact nuisance before destroying such property under ordinances.

U.S.—Traylor v. City of Amarillo, Tex., 492 F.2d 1156 (5th Cir. 1974).

9 Iowa—Kistler v. City of Perry, 719 N.W.2d 804 (Iowa 2006).

10 Tex.—Sheppard v. Giebel, 110 S.W.2d 166 (Tex. Civ. App. Austin 1937).

11 Cal.—Howard v. Superior Court, 233 Cal. App. 3d 1436, 285 Cal. Rptr. 127 (1st Dist. 1991).

As to due process for recovery of firearms, generally, see § 2058.

12 N.Y.—Wynehamer v. People, 13 N.Y. 378, 12 How. Pr. 238, 1856 WL 6728 (1856).

Conflagrations or epidemics

In cases of extreme and urgent necessity, as in conflagrations or epidemics, private property may be destroyed under authority of police power without notice or hearing.

Me.—Jordan v. Gaines, 136 Me. 291, 8 A.2d 585 (1939).

Destruction necessary to protect community welfare

Del.—Jannuzzio v. Hackett, 32 Del. Ch. 163, 82 A.2d 730 (1951).

Not limited to wartime

U.S.—In re Hoops, 3 B.R. 635 (Bankr. D. Colo. 1980), judgment aff'd, 642 F.2d 1193 (10th Cir. 1981), judgment aff'd, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982).

13 U.S.—Wantanabe Realty Corp. v. City of New York, 315 F. Supp. 2d 375 (S.D. N.Y. 2003).

14 U.S.—RBIII, L.P. v. City of San Antonio, 713 F.3d 840 (5th Cir. 2013).

15 Ky.—Varden v. Mount, 78 Ky. 86, 1879 WL 6686 (1879).

16 U.S.—Maguire v. Reardon, 255 U.S. 271, 41 S. Ct. 255, 65 L. Ed. 625 (1921).

Mont.—State v. Cook, 84 Mont. 478, 276 P. 958 (1929).

17 Ky.—Varden v. Mount, 78 Ky. 86, 1879 WL 6686 (1879).

18 U.S.—Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928).

Fla.—Haire v. Florida Dept. of Agriculture and Consumer Services, 870 So. 2d 774 (Fla. 2004).

Institution by petition

Law, authorizing destruction of infected trees, does not deny due process because of provision that state entomologist shall make inquiry to ascertain existence of disease upon petition by 10 freeholders.

U.S.—Kelleher v. French, 22 F.2d 341 (W.D. Va. 1927), aff'd, 278 U.S. 563, 49 S. Ct. 35, 73 L. Ed. 507 (1928).

19 Ohio—Van Gunten v. Worthley, 25 Ohio App. 496, 5 Ohio L. Abs. 518, 159 N.E. 326 (6th Dist. Lucas County 1927).

20 Iowa—Gray v. Thone, 196 Iowa 532, 194 N.W. 961 (1923).

21 Wis.—Adams v. City of Milwaukee, 144 Wis. 371, 129 N.W. 518 (1911), aff'd, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913).

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16D C.J.S. Constitutional Law § 2057

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

a. In General

§ 2057. Notice and hearing requirements for confiscation and destruction of property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 4078, 4090, 4097, 4460

Generally, the government's confiscation and destruction of private property is invalid unless it complies with the essential elements or fundamentals of due process, including notice and an opportunity to be heard, but preseizure notice and hearing is not required by due process when the seizure serves an important or significant governmental purpose.

While the government may confiscate and destroy private property without liability in order to protect the public health and safety;[1] otherwise, it must afford the owner due process of law.[2] So, in the absence of an emergency,[3] the government's confiscation and destruction of private property is invalid unless it complies with the essential elements or fundamentals of due process,[4] including notice[5] and an opportunity to be heard.[6] However, due process does not require that a property owner receive actual notice before the government may take the owner's property; rather, due process requires only that the government provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections.[7] Moreover, the government need not give notice in an emergency, nor

if notice would defeat the entire point of the seizure, nor when the interest at stake is small relative to the burden that giving notice would impose.[8]

Furthermore, preseizure notice and hearing is not required by due process when the seizure serves an important or significant governmental purpose,[9] as where necessary for the prevention of a continued illicit possession,[10] and to enforce criminal sanctions,[11] or in extraordinary situations.[12] To postpone notice and hearing until after seizure: (1) the deprivation must be necessary to secure an important governmental interest; (2) there must have been a special need for very prompt action; and (3) the party initiating the deprivation must have been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[13]

Due process does not entitle a person who has used his or her property as an instrument of crime to a hearing prior to seizure.[14] Moreover, when seizing property for criminal investigatory purposes, compliance with the Fourth Amendment satisfies predeprivation procedural due process as well.[15] However, a claimant's knowledge of a seizure, without more, is insufficient to defeat a due process challenge to a forfeiture proceeding premised on an absence of actual notice.[16]

A state actor's random and unauthorized deprivation of a person's property generally does not result in a procedural due process violation if the state provides an adequate postdeprivation remedy,[17] such as is provided by a statute authorizing the government to settle, for less than $50,000, a claim for damage to, or loss of, property caused by a federal investigative or law enforcement officer,[18] or as provided by an action in replevin[19] for trespass to chattels,[20] or for conversion.[21] However, where a statute authorizes seizure of property before notice and hearing, the existence of a collateral judicial remedy is insufficient to satisfy due process requirements, and the statute must provide for postseizure notice and hearing, either expressly or by implication.[22] With respect to real property, unless exigent circumstances are present, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing such property subject to civil forfeiture.[23]

When a plaintiff seeks return of property lawfully seized but no longer needed for police investigation or criminal prosecution from a state or local entity, the claim is properly advanced under the Due Process Clause of the Fourteenth Amendment.[24]

A postseizure hearing must take place within a reasonable time after the seizure occurs.[25] In assessing a procedural due process claim, the court must use a sliding scale to determine the required nature of the notice and the required quality of the hearing, with a more formal hearing being required when a significant property interest is impacted.[26]

Seizure of medicinal marijuana.

Where the defendant, who claims to be legally cultivating marijuana under state law, files a motion for the return of seized marijuana and paraphernalia, the fact that the defendant had sufficient notice and opportunity to litigate the question of whether the possession of marijuana was lawful, in that the defendant was present in state court and represented by counsel during a hearing on the motion for the return of the seized marijuana, means that due process concerns cannot preclude the application of collateral estoppel to the landowner's claims for unlawful detention of personal property and conversion.[27]

CUMULATIVE SUPPLEMENT

Cases:

Delay between seizure of bank's assets and post-deprivation hearing did not violate any clearly established constitutional right, and thus two officials of Office of the State Bank Commissioner of Kansas were entitled to qualified immunity on

§ 1983 damages claims by bank's sole shareholder for alleged procedural due process violations after bank was declared insolvent, where officials could have reasonably concluded that seizure did not substantially harm shareholder's property interest because such interest was "destroyed" when bank was declared insolvent, much of delay was justified, and, prior to insolvency determination, FDIC conducted onsite investigation and downgraded bank's ratings and bank entered into consent decree with FDIC and Commission, thus minimizing risk of mistake. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983. Columbian Financial Corp. v. Stork, 811 F.3d 390 (10th Cir. 2016).

Claims that city seized and destroyed sailboat without providing notice, that vessel owner received a phone call notifying him that police officers were taking boats, that local mariners told owner that other individuals had their boats seized and destroyed as a result of city's and officers' failure to adhere to law and appropriate procedures regarding the investigation and destruction of potentially derelict vessels, and that city referred to the systematic roundup and destruction of ugly boats in its waters as a "cleanup" program, sufficiently pled municipal liability under a § 1983 claim for procedural due process and Fourth Amendment violations. U.S.C.A. Const.Amends. 4, 14; 42 U.S.C.A. § 1983. Hoefling v. City of Miami, 811 F.3d 1271 (11th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 § 2056.

2 Cal.—Friedman v. City of Los Angeles, 52 Cal. App. 3d 317, 125 Cal. Rptr. 93 (2d Dist. 1975).

3 Cal.—Friedman v. City of Los Angeles, 52 Cal. App. 3d 317, 125 Cal. Rptr. 93 (2d Dist. 1975).

4 Md.—Burns v. Mayor and City Council of Midland, 247 Md. 548, 234 A.2d 162 (1967).

Due process application to lawfully seized property

To the extent the constitution affords any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process.

U.S.—Ahlers v. Rabinowitz, 684 F.3d 53 (2d Cir. 2012).

Due process denied where board refused to permit discovery an subpoenas by pet owner whose dog had to be removed or euthanized

Wash.—Mansour v. King County, 131 Wash. App. 255, 128 P.3d 1241 (Div. 1 2006).

Confiscation of animals

In a case in which the government's interest were not significantly heightened, in that neither the animals nor the public were in grave danger, a predeprivation hearing with respect to a pet dealer's animals is required where the animals confiscated by the city were the basis of the plaintiff pet dealer's business and livelihood.

U.S.—United Pet Supply, Inc. v. City of Chattanooga, 921 F. Supp. 2d 835 (E.D. Tenn. 2013).

Seizure of real property under drug forfeiture statute

U.S.—U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

Infringement of patent

U.S.—Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575, 135 Ed. Law Rep. 342 (1999).

A.L.R. Library

Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction Restitution Under Animal Cruelty Statutes, 70 A.L.R.6th 329.

5 U.S.—U.S. v. Plunk, 511 F.3d 918 (9th Cir. 2007); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005 (C.D. Cal. 2011).

Cal.—Friedman v. City of Los Angeles, 52 Cal. App. 3d 317, 125 Cal. Rptr. 93 (2d Dist. 1975).

N.Y.—Ozone Holding Corp. v. City of New York, 79 Misc. 2d 744, 361 N.Y.S.2d 558 (Sup 1974).

Demolition following notification

Kan.—Tingle v. City of Wichita, 211 Kan. 119, 505 P.2d 717 (1973).

Pa.—Paul v. City of Philadelphia, 58 Pa. Commw. 499, 427 A.2d 1292 (1981).

6 U.S.—U.S. v. Plunk, 511 F.3d 918 (9th Cir. 2007); DiCesare v. Stuart, 12 F.3d 973 (10th Cir. 1993); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005 (C.D. Cal. 2011).

Ohio—Marathon Oil Co. v. Board of Zoning Adjustment, 44 Ohio App. 2d 402, 73 Ohio Op. 2d 525, 339 N.E.2d 856 (10th Dist. Franklin County 1975).

No foreseeable opportunity for adjudication

U.S.—U.S. v. Paris Lopez, 111 F. Supp. 2d 100 (D.P.R. 2000).

7 **Government tax sale**

U.S.—Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

8 U.S.—OSU Student Alliance v. Ray, 699 F.3d 1053, 286 Ed. Law Rep. 83 (9th Cir. 2012), cert. denied, 134 S. Ct. 70, 187 L. Ed. 2d 29 (2013).

9 U.S.—U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555, 103 S. Ct. 2005, 76 L. Ed. 2d 143 (1983).

N.Y.—County of Nassau v. Canavan, 1 N.Y.3d 134, 770 N.Y.S.2d 277, 802 N.E.2d 616 (2003).

Seizure under criminal search warrant

U.S.—Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

10 U.S.—U.S. v. Calor, 340 F.3d 428, 2003 FED App. 0291P (6th Cir. 2003) (domestic violence case).

Ga.—Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (1974).

11 Ga.—Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (1974).

12 U.S.—Holladay v. Roberts, 425 F. Supp. 61 (N.D. Miss. 1977).

Demolition of building after tornado without notice or hearing

City's demolition of buildings and taking of their occupants' personal property after tornado without providing them notice or opportunity to be heard was not sufficiently shocking to violate occupants' and owners' substantive due process rights, even though city officials did not undertake any engineering studies or similar investigations or analyses to verify safety and salvageability of affected structures, where summary administrative action was permitted by state statute, situation colorably supported invocation of that statute, and statute provided an adequate postdeprivation remedy.

U.S.—South Commons Condominium Ass'n v. City of Springfield, 967 F. Supp. 2d 457 (D. Mass. 2013), judgment aff'd, 775 F.3d 82 (1st Cir. 2014).

13 U.S.—Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

14 U.S.—U.S. v. One 1967 Porsche, Model 911-Targa Serial No. 500-677, Motor No. 912-018, 492 F.2d 893 (9th Cir. 1974).

As to due process notice and hearing requirements of criminal forfeitures, see C.J.S., Forfeitures §§ 63 to 65.

15 U.S.—Rodgers v. Knight, 781 F.3d 932 (8th Cir. 2015).

16 U.S.—U.S. v. $41,320 U.S. Currency, 9 F. Supp. 3d 582 (D. Md. 2014), subsequent determination, 2014 WL 6698426 (D. Md. 2014).

17 § 1886.

18 U.S.—D'Amario v. U.S., 56 F. Supp. 3d 249 (W.D. N.Y. 2014).

19 U.S.—Alexander v. Hodell, 124 Fed. Appx. 665 (2d Cir. 2005); Jones v. City of St. Louis, 285 F. Supp. 2d 1212 (E.D. Mo. 2003), order amended, (Aug. 11, 2003).

20 U.S.—Alexander v. Hodell, 124 Fed. Appx. 665 (2d Cir. 2005).

21 U.S.—Crawford v. Miller, 269 Fed. Appx. 178 (3d Cir. 2008); Murphy v. Collins, 26 F.3d 541 (5th Cir. 1994).

22 Cal.—Bryte v. City of La Mesa, 207 Cal. App. 3d 687, 255 Cal. Rptr. 64 (4th Dist. 1989), reh'g denied and opinion modified, (Feb. 22, 1989).

Payments by a state

A state statute which authorizes a state to withhold payments due a contractor on a public works contract when a subcontractor fails to comply with certain requirements, allows the contractor to withhold payment to the subcontrator, and permits the contractor to sue the State for an alleged breach of contract in withholding the payment comports with due process.

U.S.—Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001).

23 U.S.—U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

Seizure of real property where methamphetamine found as valid

Property owner's due process rights under federal and state law were not violated since search warrant, which was issued to seize as contraband the real property where methamphetamine was found, was valid and the proper procedures were followed in executing the seizure.

Tex.—Real Property Located at 4125 Blanton, Wichita Falls, Wichita County, Texas, With a Legal Description of Lot 1 Block 4 University Park B1, Wichita County, Texas v. State, 230 S.W.3d 476 (Tex. App. Fort Worth 2007).

24 U.S.—Kauffman v. Pennsylvania Soc. for the Prevention of Cruelty to Animals, 766 F. Supp. 2d 555 (E.D. Pa. 2011).

25 U.S.—U.S. v. One 1978 Cadillac Sedan de Ville, New York License Plate No. 533 JPY, 490 F. Supp. 725 (S.D. N.Y. 1980); B & B Target Center, Inc. v. Figueroa-Sancha, 871 F. Supp. 2d 71 (D.P.R. 2012).

N.D.—State v. One Black 1989 Cadillac VIN 1G6DW51Y8KR722027, 522 N.W.2d 457 (N.D. 1994).

26 **Liquor license suspension**

U.S.—Orgain v. City of Salisbury, 521 F. Supp. 2d 465 (D. Md. 2007), judgment aff'd in part, 305 Fed. Appx. 90 (4th Cir. 2008).

27 U.S.—Schmidt v. County of Nevada, 808 F. Supp. 2d 1243 (E.D. Cal. 2011).

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16D C.J.S. Constitutional Law § 2058

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§ 2058. Notice and hearing requirements for confiscation and destruction of property—Contraband and firearms

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 4078, 4090, 4097, 4460, 4496

While per se contraband may be summarily forfeited without any due process protections, derivative contraband requires a modicum of due process protection.

While per se contraband may be summarily forfeited without any due process protections, derivative contraband, that is, contraband that is not inherently illegal, but becomes illegal through the manner or the intent with which it is used, possessed or acquired, is susceptible to protectible property rights and cannot be civilly forfeited without a modicum of due process protection.[1] Due process protects an interest in alleged contraband property until such time as the property is judicially determined to be contraband.[2] Thus, due process does not require a preseizure hearing in cases of the condemnation of contraband,[3] and all that is required in postseizure contraband cases is notice and hearing at which the owner or other party having an interest to be protected can appear and present his or her claim to the property being condemned.[4]

In the case of firearms, a county is not compelled to either hold a due process hearing or commence legal action when seized firearms are (1) the fruit of a crime, (2) the instrument of a crime, (3) evidence of a crime, (4) contraband, or (5) barred by court order from being possessed by the person from whom they were confiscated.[5] Thus, the State may, in the exercise of its police power, confiscate a firearm used in the commission of a crime.[6] Due process is satisfied where the statute allowing the confiscation notifies the gun owner that his or her right to possession and ownership of a firearm will be forfeited if the firearm is used in the commission of a crime and where the gun owner has an opportunity to be heard as to his or her innocence in the criminal proceedings and to be heard as to his or her right to ownership and possession of the firearm.[7] With similar procedural protection, a firearm may be destroyed.[8] Moreover, a plaintiff is not deprived of firearms without due process of law where they are seized from the plaintiff's residence by officers who arrest the plaintiff's son, staying at the residence, even though there is no postdeprivation hearing, where the officers retain the firearms because prosecutors advise them that the guns are potential evidence in ongoing criminal investigations, and there is a reasonable basis for the officers to believe there is a legitimate investigative purpose for the retention.[9]

Where a state's concealed carry licensing review board's denial of an application for a concealed-carry license under state legislation is neither random nor unauthorized, the availability of an adequate postdeprivation procedure cannot by itself necessarily preclude the applicant's claim alleging that the act's licensing scheme deprived him of his Second Amendment rights without sufficient procedural due process because the act explicitly authorizes the board to deny applications based on law enforcement objection and the board's finding that the applicant is dangerous.[10] However, under exigent circumstances, a city is not required to provide a gun shop licensee with notice and a predeprivation hearing before suspending her license and seizing her firearms, though the city is required to provide a meaningful postdeprivation notice and hearing to the licensee, which cannot be satisfied by a blanket policy of only providing a hearing after the investigation is completed, which can take months or years.[11]

Where property is not inherently dangerous to the public health and morals, but becomes so because of the use to which it is put, due process requires notice and opportunity to be heard before the taking of the property results in an absolute forfeiture of all rights therein.[12] Derivative contraband cannot be forfeited without certain due process protections,[13] such as a hearing.[14] Thus, anything which is susceptible of property rights and capable of lawful use, but kept, sold, or used in violation of law, may be forfeited and confiscated or destroyed if notice and judicial determination are provided for before final disposition of the property[15] but not otherwise.[16]

Accordingly, the confiscation of intoxicating liquors kept[17] or transported[18] in violation of law may be authorized on judicial condemnation, and it seems, even on summary proceedings, where kept in such a manner as to constitute a nuisance,[19] or where there is an extraordinary situation;[20] but such liquors are regarded as property and therefore not subject to confiscation except as stated above.[21]

Footnotes

1 U.S.—Conservation Force v. Salazar, 677 F. Supp. 2d 1203 (N.D. Cal. 2009), aff'd, 646 F.3d 1240 (9th Cir. 2011).

2 U.S.—Space Age Products, Inc. v. Gilliam, 488 F. Supp. 775 (D. Del. 1980).
Obscene materials
Fla.—Smith v. State, 678 So. 2d 17 (Fla. 4th DCA 1996).
Lienholder's interest
A lienholder was an "interested person" entitled to notice of forfeiture proceedings brought in connection with vehicles, which were seized pursuant to established government procedures, and an opportunity to

be heard; extinguishment of its liens without any meaningful procedural accommodations amounted to a violation of its due process rights.

U.S.—Ford Motor Credit Co. v. New York City Police Dept., 394 F. Supp. 2d 600 (S.D. N.Y. 2005), aff'd, 503 F.3d 186 (2d Cir. 2007).

3 Ariz.—State ex rel. Berger v. McCarthy, 113 Ariz. 161, 548 P.2d 1158 (1976).

Ga.—State v. Bailey, 233 Ga. 795, 213 S.E.2d 661 (1975).

4 Ga.—Tant v. State, 247 Ga. 264, 275 S.E.2d 312 (1981).

5 U.S.—Razzano v. County of Nassau, 765 F. Supp. 2d 176 (E.D. N.Y. 2011).

6 Wis.—State v. Williams, 148 Wis. 2d 852, 436 N.W.2d 924 (Ct. App. 1989).

7 Wis.—State v. Williams, 148 Wis. 2d 852, 436 N.W.2d 924 (Ct. App. 1989).

Notice of procedures to retrieve seized property

A city was not required to provide notice to property owners of state procedures for the return of the seized property or to provide information regarding the invocation of such procedures.

U.S.—City of West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

8 U.S.—Garcha v. City of Beacon, 351 F. Supp. 2d 213 (S.D. N.Y. 2005).

9 U.S.—Rodgers v. Knight, 781 F.3d 932 (8th Cir. 2015).

10 U.S.—DeServi v. Bryant, 2014 WL 4961615 (N.D. Ill. 2014).

11 U.S.—Spinelli v. City of New York, 579 F.3d 160 (2d Cir. 2009).

12 N.J.—Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).

13 U.S.—Conservation Force v. Salazar, 677 F. Supp. 2d 1203 (N.D. Cal. 2009), aff'd, 646 F.3d 1240 (9th Cir. 2011).

S.C.—Mims Amusement Co. v. South Carolina Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005).

14 Md.—Serio v. Baltimore County, 384 Md. 373, 863 A.2d 952 (2004).

15 U.S.—U.S. v. Spallo, 48 F.2d 891 (W.D. Mo. 1931).

Cal.—Niccoli v. McClelland, 21 Cal. App. 2d Supp. 759, 65 P.2d 853 (App. Dep't Super. Ct. 1937).

Civil action in rem

Conn.—State v. One Red M. G. Convertible, 6 Conn. Cir. Ct. 282, 271 A.2d 130 (App. Div. 1970).

16 La.—Cornman v. Conway, 178 La. 357, 151 So. 620 (1933).

Or.—State v. Glascock, 33 Or. App. 217, 576 P.2d 377 (1978).

17 Ark.—Welborn v. Morley, 219 Ark. 569, 243 S.W.2d 635 (1951).

Tenn.—Petition of Carter, 188 Tenn. 677, 222 S.W.2d 11 (1949).

Destruction pursuant to order

Statute providing for seizure and destruction of liquor unlawfully possessed without compensation to owner, pursuant to order and without notice, is not violative of due process clause as to one who obtained possession of liquor for use in home at time when such possession was lawful where possessor may sue to obtain possession and to enjoin destruction.

U.S.—Samuels v. McCurdy, 267 U.S. 188, 45 S. Ct. 264, 69 L. Ed. 568, 37 A.L.R. 1378 (1925).

18 N.C.—State v. Gordon, 225 N.C. 241, 34 S.E.2d 414 (1945).

Adequate provision for notice and hearing

Alaska—Territory of Alaska v. 188 Cases of Mixed Intoxicating Liquors, 10 Alaska 414, 1944 WL 822 (Terr. Alaska 1944).

19 La.—State v. Nejin, 140 La. 793, 74 So. 103 (1917).

20 Ga.—Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (1974).

21 Ohio—Grieb v. Department of Liquor Control of State, 153 Ohio St. 77, 41 Ohio Op. 148, 90 N.E.2d 691 (1950).

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16D C.J.S. Constitutional Law § 2059

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

b. Specific Types of Property

§ 2059. Confiscation or forfeiture of vehicles or other conveyances

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 4078, 4090, 4097, 4460

In general, statutes providing for the confiscation or forfeiture of vehicles used illegally are not unconstitutional as depriving a person of his or her property without due process of law.

In general, statutes providing for the confiscation or forfeiture of automobiles or other vehicles that have been abandoned,[1] illegally parked on public streets,[2] operated without proof of insurance[3] or a proper vehicle identification number,[4] or otherwise used illegally,[5] as in the unlawful transportation of intoxicating liquor[6] or controlled substances,[7] are not unconstitutional as depriving a person of his or her property without due process of law. This is true particularly with regard to a statute providing for forfeiture of the interest of the wrongdoer and protecting superior rights of innocent persons.[8] However, such a statute must place a burden upon the state to prove by a preponderance of the evidence that a seized conveyance was used in violation of the statute.[9] In considering what postseizure procedural due process is required for owners whose vehicles are seized pursuant to forfeiture laws, the factors to be weighed are: (1) the nature and weight of the private interest affected by the challenged official action, (2) the risk of erroneous deprivation given the procedures currently employed, and the probable value of additional

safeguards, and (3) the government's interest in avoiding additional procedural safeguards.[10] Moreover, due process requires that, in order to retain vehicles that are seized and subject to civil forfeiture as instrumentalities of a crime, there must be proof that (1) that there was probable cause for the underlying arrest; (2) that the municipality is likely to succeed on the merits of the forfeiture action; and (3) that retention of the vehicle is necessary to protect the municipality's interest in the vehicle pending the forfeiture proceeding.[11]

In connection with the seizure of a vehicle, due process requires a prompt day in court for an owner of a seized instrumentality who claims that he or she is innocent of any wrongdoing[12] although where there is a pending hearing on the state's petition for forfeiture, there is no right to an additional postseizure probable cause hearing to determine the validity of the government's seizure of the vehicle;[13] indeed, the forfeiture hearing itself provides a meaningful hearing in order for claimants and innocent owners to challenge the legality of the seizure and to protect his or her property interest in vehicle.[14] Moreover, where a delay in the institution and prosecution of a forfeiture action does not in any way deprive a claimant of the use of his or her property, there is no due process deprivation.[15] On the other hand, it has been held that federal due process requires that an innocent co-owner of a vehicle that is impounded after the other co-owner's arrest is entitled to notice and an opportunity to be heard at a hearing to contest the city's right to continued impoundment during the pendency of the forfeiture proceeding.[16]

The innocent-owner defense of the civil forfeiture statute, requiring the person asserting the defense to prove that he or she did not know or should not reasonably have known of the allegedly criminal act or omission that justified the seizure, does not violate the due process clause of the state constitution as being unduly harsh, even if the defense requires proof of a negative, because the defense does not make property owners more susceptible to forfeiture but rather adds a layer of due process protection to a statutory procedure already held to be constitutionally sound.[17] However, even when construed as authorizing the forfeiture of the interest of an innocent owner or lienor in property entrusted to a wrongdoer, such statutes are not invalid,[18] although a different rule would prevail if such statutes are construed as extending to property obtained without the owner's consent,[19] as by trespass or theft.[20] There is no valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government or any reason for holding that the one is not as plenary as the other.[21]

Statutes which provide for the confiscation or forfeiture of vehicles may be unconstitutional on the ground of denial of due process of law if provision is not made for notice of the proceedings to the owner of the vehicle and to all persons having an interest in it, and an opportunity afforded to them to be heard.[22] However, a county's failure to provide automobile owner with notice or opportunity to present a defense before towing the vehicle from the owner's driveway did not violate due process where owner was provided with postdeprivation hearing at which he was permitted to raise defense.[23] Indeed, in the realm of vehicle impoundments, administrative and judicial proceedings normally take place after considerable time has elapsed following the towing of the vehicle.[24] Moreover, a statute permitting impoundment and disposition of a vehicle without notice in situations in which notice to the legal and registered owner is not possible, or where ownership has been disclaimed, does not on its face offend due process.[25] Where a vehicle is seized pursuant to a statute authorizing seizure and forfeiture of vehicles used for unlawful purposes, due process does not require a preseizure hearing.[26] The ease with which a vehicle owner could frustrate the government's interests in the forfeitable property creates a special need for very prompt action that justifies the postponement of notice and hearing until after the seizure.[27]

Where safety is concerned or an emergency exists, the government can properly tow a private vehicle before notice and hearing.[28] However, the government must provide a hearing to allow the vehicle's owner an opportunity to timely challenge the legality of the towing.[29] A statute that allows the owner of a recovered stolen vehicle to challenge the appropriateness of a

county's tow and impoundment of the vehicle and the county's imposition of fees to secure the release of the vehicle provides an adequate postdeprivation remedy and is not a violation of procedural due process.[30]

Where statutes authorizing confiscation of a vehicle used to transport contraband provide for notice to the legal owner and afford the owner an opportunity to appear and defend, a denial of the right to appear and defend will constitute a denial of due process of law.[31] A vehicle owner's due process rights are also violated where the court's notice to appear for a vehicle forfeiture hearing is mailed to the owner's last known address, even though the court and the state's attorney's office know, or should have known, that the owner is currently incarcerated for transporting or delivering controlled substances, and the vehicle that was used in the crime is the subject of the forfeiture hearing.[32] However, even where the criminal case is still pending, the civil forfeiture of vehicles and currency seized as contraband does not violate the due process rights of a respondent who is unable to attend the hearing on petition due to incarceration, where the respondent is represented by counsel at the hearing, counsel presents evidence and argument in support of the respondent's claim, and the respondent fails to cite any evidence supporting the underlying factual assertions that the respondent's testimony is pertinent to the strategy pursued.[33] If the government seeks to confiscate a vehicle used to transport illicit articles, the court has the power to order the remission of the forfeiture to protect the legal owner of the vehicle from having his or her property taken without due process of law.[34] Any exception or exemption allowing recovery of a vehicle seized pursuant to a forfeiture statute is a matter of grace on the part of the State and not required by due process.[35]

CUMULATIVE SUPPLEMENT

Cases:

Named plaintiff of class action did not allege that signs were not posted when her car was impounded, and therefore plaintiff lacked standing to challenge city's impoundment ordinance as violative of due process based on lack of adequate notice; although plaintiff alleged that city did not post signs notifying drivers of ordinance until five years after it was passed, plaintiff did not allege that she was not provided with notice prior to city impounding her vehicle. U.S.C.A. Const.Amend. 14. McGrath v. City of Kankakee, 2016 IL App (3d) 140523, 403 Ill. Dec. 864, 55 N.E.3d 51 (App. Ct. 3d Dist. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Wong v. City & County of Honolulu, 333 F. Supp. 2d 942 (D. Haw. 2004) (Hawaii statute).
A.L.R. Library
State or municipal towing, impounding, or destruction of motor vehicles parked or abandoned on streets or highways, 32 A.L.R.4th 728.

2 Ill.—Redwood v. Lierman, 331 Ill. App. 3d 1073, 265 Ill. Dec. 432, 772 N.E.2d 803 (4th Dist. 2002).

3 La.—Fields v. State Through Dept. of Public Safety and Corrections, 714 So. 2d 1244 (La. 1998).

4 N.Y.—Carlone v. Adduci, 180 A.D.2d 282, 584 N.Y.S.2d 924 (3d Dep't 1992).

5 U.S.—U.S. v. One 1971 Mercedes Benz 2-Door Coupe, Serial No. 11304412023280, 542 F.2d 912 (4th Cir. 1976).
Vehicle used in aggravated DUI
Due process does not require a predetention hearing in the context of a forfeiture proceeding if the property is mobile and could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given.
Ill.—People v. One 1998 GMC, 2011 IL 110236, 355 Ill. Dec. 900, 960 N.E.2d 1071 (Ill. 2011).

Driving while intoxicated

N.Y.—County of Nassau v. Canavan, 1 N.Y.3d 134, 770 N.Y.S.2d 277, 802 N.E.2d 616 (2003).

6 U.S.—General Finance Co. of La. v. U.S., 45 F.2d 380 (C.C.A. 5th Cir. 1930).

Pa.—Com. v. One Studebaker Sedan, 140 Pa. Super. 197, 14 A.2d 198 (1940).

Transportation of articles used in manufacture

The transportation in vehicle of cans which were used in illegal manufacture of intoxicating liquor would authorize forfeiture of vehicle, and statute providing for such forfeiture was valid.

Pa.—Com. v. One 1936 Ford Truck, Three Ton, 136 Pa. Super. 473, 7 A.2d 532 (1939).

7 Ga.—Tant v. State, 247 Ga. 264, 275 S.E.2d 312 (1981).

Ill.—People ex rel. Carey v. 1975 Mercedes 4-Door, Serial No. 11511412005952, 86 Ill. App. 3d 893, 41 Ill. Dec. 955, 408 N.E.2d 377 (1st Dist. 1980).

Mo.—Hampton v. Thurmand, 619 S.W.2d 310 (Mo. 1981).

Neb.—State v. One 1968 Volkswagen, 198 Neb. 45, 251 N.W.2d 666 (1977).

Pa.—One 1965 Buick 4 Door Sedan v. Com., 46 Pa. Commw. 189, 408 A.2d 157 (1979).

Yacht

U.S.—Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

8 U.S.—National Bond & Investment Co. v. Gibson, 6 F.2d 288 (D. Kan. 1925).

N.C.—C.I.T. Corp. v. Burgess, 199 N.C. 23, 153 S.E. 634 (1930).

9 U.S.—Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn. 1972).

10 U.S.—Simms v. District of Columbia, 872 F. Supp. 2d 90 (D.D.C. 2012).

11 U.S.—Corbley v. County of Suffolk, 45 F. Supp. 3d 276 (E.D. N.Y. 2014).

12 N.Y.—County of Nassau v. Canavan, 1 N.Y.3d 134, 770 N.Y.S.2d 277, 802 N.E.2d 616 (2003).

13 U.S.—U.S. v. One 1971 BMW 4-Door Sedan, Model 2800, Gray in Color VIN 2320587, AZ. LIC. RNM-898, 652 F.2d 817 (9th Cir. 1981).

Ill.—People v. One 1998 GMC, 2011 IL 110236, 355 Ill. Dec. 900, 960 N.E.2d 1071 (Ill. 2011).

14 Ill.—People v. One 1998 GMC, 2011 IL 110236, 355 Ill. Dec. 900, 960 N.E.2d 1071 (Ill. 2011).

15 U.S.—U.S. v. One (1) 1973 Ford LTD, Serial No. 3J66S132017, 409 F. Supp. 741 (D. Nev. 1976).

16 N.Y.—Property Clerk of Police Dept. of City of New York v. Harris, 9 N.Y.3d 237, 848 N.Y.S.2d 588, 878 N.E.2d 1004 (2007).

17 Tex.—El-Ali v. State, 388 S.W.3d 890 (Tex. App. Houston 14th Dist. 2012), review denied, 428 S.W.3d 824 (Tex. 2014).

18 U.S.—Van Oster v. State of Kansas, 272 U.S. 465, 47 S. Ct. 133, 71 L. Ed. 354, 47 A.L.R. 1044 (1926).

Cal.—People v. One 1941 Buick Sport Coupe, 28 Cal. 2d 692, 171 P.2d 719 (1946).

Pa.—Com. v. One Studebaker Sedan, 140 Pa. Super. 197, 14 A.2d 198 (1940).

19 Cal.—People v. One 1941 Buick Sport Coupe, 28 Cal. 2d 692, 171 P.2d 719 (1946).

20 U.S.—U.S. v. One Buick Roadster, 280 F. 517 (D. Mont. 1922).

Tractor obtained by trespass

U.S.—U.S. v. One Model H Farmall Tractor, Serial No. 117099, 51 F. Supp. 603 (W.D. Tenn. 1943).

21 U.S.—Van Oster v. State of Kansas, 272 U.S. 465, 47 S. Ct. 133, 71 L. Ed. 354, 47 A.L.R. 1044 (1926).

22 Haw.—Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999), as amended, (July 13, 1999).

Wash.—State v. One 1972 Mercury Capri, Motor No. GAECLP 94216, Serial No. GAECLP 94216, 85 Wash. 2d 620, 537 P.2d 763 (1975).

Procedural rather than substantive right

Question of notice under statutory provisions pertaining to forfeiture of vehicles used in violating uniform narcotic drug law is procedural and not substantive; thus, failure of such provisions to provide for notice did not render application denial of due process where State gave notice of motion for forfeiture order and hearing was provided.

N.J.—State v. Garcia, 114 N.J. Super. 444, 276 A.2d 880 (Law Div. 1971).

Reasonably calculated notice requirement

(1) Where State knew owner of automobile was not at address to which notice of forfeiture proceeding was mailed and knew that owner could not get to address, manner of service, although permissible under statute, was not reasonably calculated to apprise owner of pendency of proceedings and deprived owner of due process of law.

U.S.—Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).

(2) Due process may not demand actual notice in every case of summary forfeiture but it forbids use of method which is not reasonably calculated to reach those who could easily be informed by other means readily at hand.

U.S.—Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972).

Removal of inoperable vehicles

(1) Statute permitting disposition of a vehicle without notice just because the vehicle is 10-model-years-old or older, even though the removal of major parts or material damage has rendered the vehicle inoperable, does not satisfy constitutional due process requirements.

U.S.—Wong v. City & County of Honolulu, 333 F. Supp. 2d 942 (D. Haw. 2004) (Hawaii statute).

(2) Prior to towing away an inoperable motor vehicle from private residential property, a municipality must provide reasonable notice to interested persons and an opportunity for a hearing.

Ill.—Redwood v. Lierman, 331 Ill. App. 3d 1073, 265 Ill. Dec. 432, 772 N.E.2d 803 (4th Dist. 2002).

23 U.S.—Shipley v. Orndoff, 491 F. Supp. 2d 498 (D. Del. 2007).

24 U.S.—Shipley v. Orndoff, 491 F. Supp. 2d 498 (D. Del. 2007).

Administrative necessity for postdeprivation hearing

The reason for denying a predeprivation hearing in the context of vehicle impoundment is that such a hearing is impossible if the city is to be able to enforce its parking rules.

U.S.—City of Los Angeles v. David, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

25 U.S.—Wong v. City & County of Honolulu, 333 F. Supp. 2d 942 (D. Haw. 2004) (Hawaii statute).

26 Ariz.—State ex rel. Berger v. McCarthy, 113 Ariz. 161, 548 P.2d 1158 (1976).

Ohio—Thomas v. Cleveland, 140 Ohio App. 3d 136, 746 N.E.2d 1130 (8th Dist. Cuyahoga County 2000).

Towing of car illegally parked on public street

Ill.—Redwood v. Lierman, 331 Ill. App. 3d 1073, 265 Ill. Dec. 432, 772 N.E.2d 803 (4th Dist. 2002).

27 U.S.—Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

Fishing boats

Alaska—Waiste v. State, 10 P.3d 1141 (Alaska 2000).

28 N.M.—Sandia v. Rivera, 132 N.M. 201, 2002-NMCA-057, 46 P.3d 108 (Ct. App. 2002).

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State or municipal towing, impounding, or destruction of motor vehicles parked or abandoned on streets or highways, 32 A.L.R.4th 728.

29 N.M.—Sandia v. Rivera, 132 N.M. 201, 2002-NMCA-057, 46 P.3d 108 (Ct. App. 2002).

30 U.S.—Carcamo v. Miami-Dade County, 375 F.3d 1104 (11th Cir. 2004).

Hearing after impoundment for lack of proof of insurance

La.—Fields v. State Through Dept. of Public Safety and Corrections, 714 So. 2d 1244 (La. 1998).

As to adequacy of postdeprivation process, generally, see § 1886.

31 Cal.—People v. One 1950 Mercury Sedan, Engine No. 50LA40896M, 1950 License No. 29B9130, 116 Cal. App. 2d 746, 254 P.2d 666 (2d Dist. 1953) (overruled in part on other grounds by, People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538, 55 A.L.R.2d 1272 (1955)).

32 N.D.—State v. One 2002 Dodge Intrepid Auto., 2013 ND 234, 841 N.W.2d 239 (N.D. 2013).

33 Ga.—Orange v. State, 319 Ga. App. 516, 736 S.E.2d 477 (2013).

34 U.S.—U.S. v. One 1950-51 Ford Van Type One and One-Half Ton Truck, 118 F. Supp. 310 (E.D. Va. 1954).

35 U.S.—Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn. 1972).

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16D C.J.S. Constitutional Law § 2060

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

b. Specific Types of Property

§ 2060. Confiscation or forfeiture of property used in illegal activities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4078, 4097, 4281, 4289, 4460

The rules governing the confiscation or destruction of property have been applied to property used in illegal activities, such as drugs, and lottery and gambling paraphernalia.

Misbranded drugs transported in interstate commerce may be taken by condemnation,[1] and the government may take samples of medicine for tests in condemnation suits.[2] Under statutes authorizing the seizure of articles because of misbranding, the fact that there are multiple seizures does not, in and of itself, constitute a denial of due process.[3] However, multiple seizures may be so arbitrarily and destructively engaged in as to be violative of the Due Process Clause,[4] and an arbitrary exercise of power in causing libels to be brought against alleged adulterated medical products in numerous widely scattered cities constitutes a denial of due process.[5]

Statutes which provide for the closing and padlocking of a building because of its use in illegal activities are in denial of due process of law if no provision is made for notice to the owner of the building and no opportunity is afforded the owner to

be heard.[6] The guaranty of due process is not satisfied just because the owner has the right to recover possession of his or her property by giving a bond conditioned that the building will not be used for unlawful purposes for a specified length of time.[7] In general, the government may demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require immediate demolition of the building to protect the public from imminent danger.[8] In other circumstances, however, such summary action is inappropriate, and notice and an opportunity to be heard must be provided.[9]

The confiscation of boats, nets, or fishing tackle used in violation of law may be authorized on notice and hearing,[10] and such property may be summarily seized and destroyed without violation of due process of law,[11] if it is properly considered to be a public nuisance,[12] or is of minor or trifling value.[13] However, in the absence of these conditions, due process does not permit the destruction of such property[14] or of guns, ammunition, or other property used in unlawful hunting.[15] Statutes which authorize the summary seizure and disposal of fish and game illegally taken are not in violation of due process of law.[16] Moreover, the forfeiture of cash seized during a search of the claimant's residence for drugs and other contraband, without an evidentiary hearing, does not violate due process where the claimant is given notice of the forfeiture, and the district court concludes that, even if the claimant were able to produce evidence that he or she intended to present, it would have ruled that the cash was subject to forfeiture.[17]

The Due Process Clause does not have an independent guarantee of additional process by state law-enforcement officers before seizure of gaming machines as suspected contraband.[18] However, if gambling devices, such as slot machines, are property susceptible of ownership and are not per se contraband, a statute which requires their summary destruction without provision for notice or hearing is violative of the constitutional guaranty of due process,[19] and the seizure by police officers of automatic vending machines which do not constitute gambling devices deprive owners of property without due process.[20] Moreover, even if the gaming device is contraband per se, the government cannot destroy it without giving the owner an opportunity to contest the determination of illegality.[21] However, it is also held that where gambling laws do not extend a property right to illegal gambling machines, the owner of a device that clearly falls under the description of an "illegal gambling machine" does not have a due process right to a hearing prior to the confiscation and destruction of the device.[22] Since the legislature may authorize the summary seizure and destruction of things which cannot be put to a lawful use, and things which are obnoxious to the public health and safety or to the public morals, statutes may provide for the summary seizure and destruction of certain paraphernalia used in gambling,[23] or in the operation of an illegal lottery,[24] without being violative of due process of law. A claimant of gambling devices seized for destruction who has his or her day in court and whose rights are determined in regularly conducted judicial proceeding is afforded due process of law.[25] Moreover, a statute that amends the definition of "slot machine" is not a taking from the operator of a gaming establishment without due process under state law, where nothing is taken from the operator, the statute does not revoke the operator's license; rather, it clarifies the type of machine that the operator can legally operate, and, even before the operator begins its operations, it is on notice from the Attorney General's Office that its proposed machines are illegal.[26]

Activities of lessees.

Ex parte probable cause hearings administered prior to the seizure of public leaseholds do not provide sufficient due process protection of the tenants' expectations of freedom and privacy in their homes.[27]

Imported property.

Congress may authorize the destruction of property the importation of which has been denied for failure to come up to the legal standard and which has not been exported within a certain time.[28]

Footnotes

1 U.S.—U.S. v. 62 Packages, More or Less, of Marmola Prescription Tablets, 48 F. Supp. 878 (W.D. Wis. 1943), judgment aff'd, 142 F.2d 107 (C.C.A. 7th Cir. 1944).

2 U.S.—U.S. v. B. & M. External Remedy, 36 F.2d 53 (S.D. N.Y. 1929).

3 U.S.—Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950); Victrylite Candle Co. v. Brannan, 201 F.2d 206 (D.C. Cir. 1952).

4 U.S.—Victrylite Candle Co. v. Brannan, 201 F.2d 206 (D.C. Cir. 1952).

5 U.S.—National Remedy Co. v. Hyde, 50 F.2d 1066 (App. D.C. 1931).

6 Neb.—State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N.W.2d 734 (1944).

Hearing on subsequent petition

Ga.—Baskin v. Meadors, 196 Ga. 802, 27 S.E.2d 696 (1943).

Nuisance abatement statute

County prosecutor could not, consistent with due process, proceed to lock up persons' property pursuant to nuisance abatement statute without first diligently trying to give that person actual knowledge of the proceeding and opportunity to be heard.

Mich.—State ex rel. Wayne County Prosecutor v. Gladstone, 64 Mich. App. 55, 235 N.W.2d 60 (1975).

7 Va.—McNelis v. Com., 171 Va. 471, 198 S.E. 493 (1938).

8 U.S.—Wantanabe Realty Corp. v. City of New York, 315 F. Supp. 2d 375 (S.D. N.Y. 2003).

9 Ark.—Ingram v. City of Pine Bluff, 355 Ark. 129, 133 S.W.3d 382 (2003).

N.Y.—Noroian v. City of Port Jervis, 16 A.D.3d 392, 791 N.Y.S.2d 147 (2d Dep't 2005).

N.C.—Monroe v. City of New Bern, 158 N.C. App. 275, 580 S.E.2d 372 (2003).

Tenn.—Manning v. City of Lebanon, 124 S.W.3d 562 (Tenn. Ct. App. 2003).

10 U.S.—Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).

La.—State v. Billiot, 254 La. 988, 229 So. 2d 72 (1969).

11 Ga.—Price v. Hamilton, 146 Ga. 705, 92 S.E. 62 (1917) (statute which required sheriffs to break open traps for catching fish if traps were illegally placed in streams did not offend due process of law).

12 U.S.—Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).

Ohio—State v. French, 71 Ohio St. 186, 73 N.E. 216 (1905).

13 U.S.—Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).

14 U.S.—U.S. v. State of Wash., 384 F. Supp. 312 (W.D. Wash. 1974), aff'd and remanded on other grounds, 520 F.2d 676 (9th Cir. 1975).

15 Miss.—Kellogg v. Strickland, 191 So. 2d 536 (Miss. 1966).

16 Ga.—Creaser v. Durant, 197 Ga. 531, 29 S.E.2d 776 (1944).

Remedies afforded owner

Statute permitting forfeiture of property used in violation of game laws was not invalid as violating fundamental law by authorizing destruction without notice and without opportunity to contest in judicial proceeding, the owner having a remedy by replevin or by action against officers.

Wash.—Dilatush v. Roberts, 131 Wash. 220, 229 P. 741 (1924).

17 U.S.—U.S. v. Richards, 567 Fed. Appx. 591 (10th Cir. 2014).

18 U.S.—Ford v. Strange, 580 Fed. Appx. 701 (11th Cir. 2014).

19 U.S.—Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003) (North Carolina statute).

Seizure without notification of tax due

U.S.—U.S. v. One Bally Sun Valley Pinball Mach., 340 F. Supp. 307 (W.D. La. 1972).

20 U.S.—Mills Novelty Co. v. Farrell, 3 F. Supp. 555 (D. Conn. 1933), aff'd, 64 F.2d 476 (C.C.A. 2d Cir. 1933).

21 S.C.—State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

A.L.R. Library

Constitutionality of statutes providing for destruction of gambling devices, 14 A.L.R.3d 366.

22 Miss.—Trainer v. State, 930 So. 2d 373 (Miss. 2006).

23 La.—State v. Madere, 400 So. 2d 665 (La. 1981).

Ohio—Columbus Legal Amusement Ass'n v. City of Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 2d Dist. Franklin County 1947).

Enforcement of statute by suit

Or.—Smith v. One Super Wild Cat Console Mach., 10 Or. App. 587, 500 P.2d 498 (1972).

Registration requirement

Where claimant was actively engaged in exact business which Congress sought to regulate, seizure and forfeiture of pinball machines because not registered as required did not violate due process though he had not been notified that seizure and forfeiture would result.

U.S.—U.S. v. Various Gambling Devices, 478 F.2d 1194 (5th Cir. 1973).

24 Cal.—Collins v. Lean, 68 Cal. 284, 9 P. 173 (1885).

Money used in illegal lottery operations

N.J.—Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).

25 Colo.—Stanley-Thompson Liquor Co. v. People, 63 Colo. 456, 168 P. 750 (1917).

26 Md.—CCI Entertainment, LLC v. State, 215 Md. App. 359, 81 A.3d 528 (2013).

27 U.S.—Richmond Tenants Organization, Inc. v. Kemp, 753 F. Supp. 607 (E.D. Va. 1990), judgment aff'd, 956 F.2d 1300 (4th Cir. 1992) (drug-related activity in public housing).

28 U.S.—Buttfield v. U.S., 192 U.S. 499, 24 S. Ct. 356, 48 L. Ed. 537 (1904).

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16D C.J.S. Constitutional Law § 2061

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

1. Confiscation and Destruction of Property

b. Specific Types of Property

§ 2061. Confiscation or forfeiture of property of national of enemy nation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4240, 4460
West's Key Number Digest, Eminent Domain 2.24
West's Key Number Digest, War and National Emergency 1038, 1039

The Due Process Clause of the Constitution does not limit the right under the War Power Clause to confiscate property of a national of an enemy nation.

The constitutional provision empowering Congress to declare war and make rules concerning captures on land and water vests in Congress the sole power to authorize confiscation of the enemy's property,[1] and the Due Process Clause of the Constitution does not limit the right under the War Power Clause to confiscate property of a national of an enemy nation.[2] The government may determine what property of the public enemy will be confiscated[3] and may authorize seizure thereof without according to a claimant friend, authorized to sue for that purpose thereafter, the right to have his or her claim determined before seizure.[4]

A statute which authorizes the seizure of property of a national of an enemy is in conflict with the Due Process Clause if it permits the federal government to seize funds of a state on the pretext that such funds belong to an enemy and provides no remedy whereby the State can regain the funds so seized.[5] Refusal of the United States to pay interest on proceeds of the wrongful sale of securities by the alien property custodian, in absence of a statute providing therefor, is not violative of the Due Process Clause.[6]

Compensable military takings under the Fifth Amendment occur when the military merely carries out the sovereign's eminent domain prerogative, whereas when a military taking occurs pursuant to the exercise of the sovereign's war-making functions, the sovereign is immune from liability and the claim is not cognizable under the Fifth Amendment.[7] Under the "military necessity doctrine," civilian property destroyed or expropriated because of the exigencies of military action falls outside the Fifth Amendment.[8] Indeed, the sovereign is immune from liability for the confiscation of private property taken by the military, through destruction or otherwise, to prevent it from falling into enemy hands, or to protect the health of the troops, or as an incidental element of defense against hostile attack and is not compensable under Fifth Amendment.[9] In case of enemy property destroyed by the military, the "enemy property doctrine" provides that the United States does not have to answer under the Takings Clause for the destruction of enemy property.[10]

Footnotes

1 C.J.S., War and National Defense §§ 17 to 23.

2 U.S.—Schill v. McGrath, 89 F. Supp. 339 (S.D. N.Y. 1950).

3 U.S.—Miller v. U.S., 78 U.S. 268, 20 L. Ed. 135, 1870 WL 12744 (1870).
Retention pending settlement
U.S.—Cummings v. Deutsche Bank und Disconto-Gesellschaft, 300 U.S. 115, 57 S. Ct. 359, 81 L. Ed. 545 (1937).

4 U.S.—Stohr v. Wallace, 269 F. 827 (S.D. N.Y. 1920), aff'd, 255 U.S. 239, 41 S. Ct. 293, 65 L. Ed. 604 (1921).

5 Pa.—U. S. v. Board of Finance and Revenue, 369 Pa. 386, 85 A.2d 156 (1951).

6 U.S.—Kny v. Miller, 2 F.2d 313 (App. D.C. 1924).

7 U.S.—Al-Qaisi v. U.S., 103 Fed. Cl. 439 (2012), aff'd, 474 Fed. Appx. 776 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 867, 184 L. Ed. 2d 680 (2013).

8 U.S.—Doe v. U.S., 95 Fed. Cl. 546 (2010).

9 U.S.—Doe v. U.S., 95 Fed. Cl. 546 (2010).

10 U.S.—Doe v. U.S., 95 Fed. Cl. 546 (2010).

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16D C.J.S. Constitutional Law § 2062

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

2. Eminent Domain; Condemnation

a. In General

§ 2062. Due process limits on eminent domain and condemnation, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4076

The proper exercise of the power of eminent domain constitutes due process of law and not a taking of property in violation of the due process of law guaranty.

Eminent domain is the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property for public use and to appropriate the ownership and possession of such property for such use on paying the owner a due compensation.[1] The Federal Constitution, in the Fifth Amendment, provides that the federal government may not take private property for public use without just compensation.[2] The Fifth Amendment Eminent Domain Clause applies to the states through the Fourteenth Amendment due process guarantee.[3] In addition, many state constitutions also expressly provide that private property may not be taken for public use without just compensation.[4] Thus, the power of eminent domain is subject to several important constitutional limits: the property acquired must be taken for a "public use," and the government must pay "just compensation" in exchange for the property.[5] If the power of eminent domain is properly exercised, it constitutes due process of law and not a taking of property in violation of the due process of law guaranty.[6] However, the State's exercise of

police powers in effecting the forfeiture of citizens' property requires black letter compliance to procedural rules intended to safeguard the due process rights of citizens.[7]

On the other hand, if the established conditions or requirements for the exercise of the power of eminent domain are not properly complied with, the action of the state or municipality, or other delegated agency, is unconstitutional as a taking of private property for public use without due process of law,[8] as where the condemnation is made without proper authority therefor,[9] or fails to make any provision to safeguard the rights of owners whose property may receive no benefit from the public improvement contemplated and yet be taxed to construct and maintain it or whose property has been wrongfully included.[10] The power to condemn private property may generally be exercised only for a public purpose,[11] and due process limits the power to condemn private property to such and only so much property as is necessary for the public use in question.[12]

CUMULATIVE SUPPLEMENT

Cases:

The Takings Clause of the Fifth Amendment is made applicable to the States through the Fourteenth Amendment. U.S.C.A. Const.Amends. 5, 14. Murr v. Wisconsin, 2017 WL 2694699 (U.S. 2017).

[END OF SUPPLEMENT]

Footnotes

1 C.J.S., Eminent Domain § 1.

2 C.J.S., Eminent Domain § 3.

3 U.S.—Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); Ward v. Ryan, 623 F.3d 807 (9th Cir. 2010); Temple-Inland, Inc. v. Cook, 2015 WL 1069274 (D. Del. 2015).
Ala.—Ex parte Alabama Dept. of Transp., 143 So. 3d 730 (Ala. 2013).
Fla.—Alachua Land Investors, LLC v. City of Gainesville, 107 So. 3d 1154 (Fla. 1st DCA 2013).
Tex.—Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468 (Tex. 2012), cert. denied, 133 S. Ct. 1999, 185 L. Ed. 2d 867 (2013).
The public-use requirement of the Fifth Amendment power of eminent domain has been made applicable to the states through the Fourteenth Amendment
U.S.—Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).
A.L.R. Library
Validity of Extraterritorial Condemnation by Municipality, 44 A.L.R.6th 259

4 Iowa—Molo Oil Co. v. The City Of Dubuque, 692 N.W.2d 686 (Iowa 2005).
Mich.—City of Novi v. Robert Adell Children's Funded Trust, 473 Mich. 242, 701 N.W.2d 144 (2005).

5 Mich.—Dowerk v. Charter Tp. of Oxford, 233 Mich. App. 62, 592 N.W.2d 724 (1998).
N.J.—Township of West Orange v. 769 Associates, L.L.C., 172 N.J. 564, 800 A.2d 86 (2002).
Va.—Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc., 272 Va. 2, 630 S.E.2d 505 (2006).

6 U.S.—Hays v. Port of Seattle, 251 U.S. 233, 40 S. Ct. 125, 64 L. Ed. 243 (1920).
Ga.—Collins v. Metropolitan Atlanta Rapid Transit Authority, 163 Ga. App. 168, 291 S.E.2d 742 (1982).
Miss.—Butler v. City of Eupora, 725 So. 2d 158 (Miss. 1998).

7 Tenn.—State v. Sprunger, 2015 WL 1058222 (Tenn. 2015).

8 Mich.—Gunn v. Delhi Tp., Ingham County, 8 Mich. App. 278, 154 N.W.2d 598 (1967).

Tex.—Matador Pipelines, Inc. v. Watson, 626 S.W.2d 139 (Tex. App. Waco 1981), writ refused n.r.e., (Mar. 17, 1982).

9 Mo.—State ex rel. Cranfill v. Smith, 330 Mo. 252, 48 S.W.2d 891, 81 A.L.R. 1066 (1932) (ultra vires ordinance).

10 Neb.—Elliott v. Wille, 112 Neb. 78, 200 N.W. 347 (1924).

11 C.J.S., Eminent Domain § 27.

Guise of public use

Taking of property for private use under guise of public use may violate due process.

Tex.—Whitfield v. Klein Independent School Dist., 463 S.W.2d 232 (Tex. Civ. App. Houston 14th Dist. 1971), writ refused n.r.e., (May 19, 1971).

12 Fla.—Brest v. Jacksonville Expressway Authority, 194 So. 2d 658, 20 A.L.R.3d 854 (Fla. 1st DCA 1967), judgment aff'd, 202 So. 2d 748 (Fla. 1967).

Taking of excess property

Where city condemned tract of land and took entire fee, although it needed only the subsurface and first floor level, there was no denial of due process because city also took property above the first floor level since no practical method was presented for dividing the property horizontally.

Mich.—Cleveland v. City of Detroit, 322 Mich. 172, 33 N.W.2d 747 (1948).

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16D C.J.S. Constitutional Law § 2063

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

2. Eminent Domain; Condemnation

a. In General

§ 2063. Substantive due process and taking of private property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4076

In some jurisdictions, a claim that an alleged taking violates the Fourteenth Amendment Substantive Due Process Clause is precluded when the alleged violation is addressed by the explicit textual provisions of the Fifth Amendment Takings Clause.

The question whether property owners may ever successfully articulate a substantive due process claim concerning a takings issue is still open in some jurisdictions.[1] Some courts hold that a claim that an alleged taking violates the Fourteenth Amendment Substantive Due Process Clause is precluded when the alleged violation is addressed by the explicit textual provisions of the Fifth Amendment Takings Clause.[2] Accordingly, in certain jurisdictions, a plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim,[3] and a plaintiff in such jurisdictions cannot style an unsuccessful takings claim as a substantive due process claim.[4]

Where the court allows a substantive due process claim to proceed, condemnation of property is not viewed as violating a fundamental right so as to require the taking to be narrowly tailored to serve a compelling state interest but rather is analyzed solely to determine if there is a reasonable fit between the governmental purpose and the means chosen to advance that purpose.[5] A substantive due process analysis thus may be appropriate under circumstances in which an arbitrary taking is alleged.[6] The "shocks the conscience" standard for substantive due process claims challenging the taking of property by state officials requires more than bad faith or improper motive.[7] Indeed, there is an extremely high burden of proving that a city ordinance is not rationally related to a legitimate governmental purpose for purposes of their substantive due process claim.[8] The exercise of eminent domain to take properties for purposes of economic development, despite no indication of blight, does not so shock conscience as to rise to the level of a substantive due process violation even if it violated state law.[9]

CUMULATIVE SUPPLEMENT

Cases:

Property developers did not adequately allege that character of county's amendment to master plan, which governed zoning requirements for developers' property, was akin to physical invasion by government, and, thus, failed to state regulatory takings claim; amendment was reasonable land-use regulation, enacted as part of coordinated state and local effort to preserve river and surrounding land. U.S. Const. Amend. 5. Pulte Home Corporation v. Montgomery County, Maryland, 271 F. Supp. 3d 762 (D. Md. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Garvie v. City of Ft. Walton Beach, Fla., 366 F.3d 1186 (11th Cir. 2004).

2 U.S.—Madison v. Graham, 316 F.3d 867 (9th Cir. 2002); Martel v. City of Newton, Kansas, 72 F. Supp. 2d 1256 (D. Kan. 1999).
Mich.—Cummins v. Robinson Twp., 283 Mich. App. 677, 770 N.W.2d 421 (2009) (applying federal law).

3 U.S.—Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999); Lytle v. Potter, 480 F. Supp. 2d 986 (N.D. Ohio 2006).
Mich.—Cummins v. Robinson Twp., 283 Mich. App. 677, 770 N.W.2d 421 (2009) (applying federal law).

4 U.S.—Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046 (9th Cir. 2004).

5 Iowa—ACCO Unlimited Corp. v. City of Johnston, 611 N.W.2d 506 (Iowa 2000).

6 U.S.—Whittaker v. County of Lawrence, 674 F. Supp. 2d 668 (W.D. Pa. 2009), judgment aff'd, 437 Fed. Appx. 105 (3d Cir. 2011).

7 U.S.—Hynoski v. Columbia County Redevelopment Authority, 941 F. Supp. 2d 547, 91 Fed. R. Evid. Serv. 204 (M.D. Pa. 2013).

8 U.S.—Barr v. City, County of Honolulu, 2009 WL 1955738 (D. Haw. 2009).

9 U.S.—Whittaker v. County of Lawrence, 437 Fed. Appx. 105 (3d Cir. 2011).

16D C.J.S. Constitutional Law § 2064

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§ 2064. Compensation for taking private property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4076

Just compensation is required as an element of due process of law with respect to the taking of private property for a public use.

The exercise of the power of eminent domain is subject to the constitutional right of the owner of the property taken to just compensation,[1] and although the constitutional prohibition against the taking of property without due process of law does not specify or regulate compensation, just compensation, made or secured, is required as an element of due process of law with respect to the taking of private property, or any of its attributes, for a public use.[2] Due process is satisfied whenever adequate provision is made for the ascertainment of just compensation pursuant to regular processes of law and for its payment when ascertained in the due course of procedure,[3] or where, although the statute providing for the condemnation makes no adequate provision for compensation, gifts and contributions have been made for that purpose.[4]

The due process of law guaranty does not prevent a state in the exercise of its police power, from taking, damaging, or destroying private property without compensation, when public necessity, health, or safety require it.[5] This does not justify, however, the taking of private property for public use without just compensation or due process of law within the purview of eminent domain.[6]

Footnotes

1 C.J.S., Eminent Domain § 67.

2 U.S.—West v. Chesapeake & Potomac Telephone Co. of Baltimore City, 295 U.S. 662, 55 S. Ct. 894, 79 L. Ed. 1640 (1935).
Mont.—Montana Talc Co. v. Cyprus Mines Corp., 229 Mont. 491, 748 P.2d 444 (1987).
R.I.—Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006).
Hearing to determine just compensation required
U.S.—Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005).
Under Federal Constitution
Protection of private property in Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation; similar assumption is made in decisions upon Fourteenth Amendment.
U.S.—Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).
N.Y.—Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 (1938).

3 U.S.—Baldwin v. Appalachian Power Co., 556 F.2d 241 (4th Cir. 1977).
N.Y.—First Broadcasting Corp. v. City of Syracuse, 78 A.D.2d 490, 435 N.Y.S.2d 194 (4th Dep't 1981).

4 U.S.—Suncrest Lumber Co. v. North Carolina Park Commission, 30 F.2d 121 (W.D. N.C. 1929).

5 § 2056.

6 Ill.—Sanitary Dist. of Chicago v. Commonwealth Edison Co., 357 Ill. 255, 192 N.E. 248 (1934).

16D C.J.S. Constitutional Law § 2065

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§ 2065. General procedural requirements in eminent domain cases

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4077

The procedure which is employed to exercise the power of eminent domain must be consonant with the requirements of due process of law.

The provisions of statutes authorizing the taking of private property for a public use under the power of eminent domain generally control the question of due process of law with respect to matters of procedure in the taking of such property.[1] Condemnation proceedings pursuant to statute are generally held to constitute due process of law if they afford proper safeguards to the rights of the property owner to contest the taking of his or her property and to receive just compensation therefor;[2] if the statutory requirements are substantially complied with;[3] if the court acting in the condemnation proceedings has jurisdiction thereof;[4] if the jurisdiction of a properly constituted, and fair and impartial, tribunal is invoked in some appropriate way and makes inquiry as to the amount of the compensation;[5] and if the owner has a full and fair trial under general provisions of law applicable to all persons in his or her situation.[6]

Due process does not guarantee any particular form or method of condemnation procedure.[7] The trial need not be devoid of all error, and not every mistake amounts to a denial of due process of law.[8] In order to constitute a taking without due process by force of a judgment in the condemnation proceedings, the error must be gross and obvious, coming close to arbitrary action.[9]

Due process of law does not include the right to appeal for a review of the condemnation proceedings where the trial takes place in a court of competent jurisdiction.[10] Due process, however, does require the right to appeal from a lesser tribunal, as provided by statute, if it affords ample protection to the landowner.[11] In any event, due process guarantees a property owner judicial review of whether the government acted arbitrarily, capriciously, or in bad faith in determining that the taking was necessary.[12]

Abandonment of proceedings.

The due process of law guaranty is not violated by a statute authorizing the condemnor to abandon the condemnation proceedings before the government has actually taken possession of the property notwithstanding the owner has been put to some expense in protecting his or her rights,[13] particularly where the statute contemplates that the owner will be reimbursed for such expense.[14] Even if the condemnor takes possession of the property before the proceedings are finally determined, and thereafter abandons the proceedings and relinquishes the possession of the property, there is no denial of due process of law.[15] So, also, a statute which authorizes the discontinuance and abandonment of condemnation proceedings on a consideration of the report of the appraisers, and bars for one year thereafter the institution of proceedings to acquire the same property, does not violate the due process of law clause.[16]

Footnotes

1 Nev.—Schrader v. Third Judicial Dist. Ct. in and for Eureka County, 58 Nev. 188, 73 P.2d 493 (1937).
N.H.—State v. 4.7 Acres of Land, 95 N.H. 291, 62 A.2d 732 (1948).
A.L.R. Library
Construction and Application of "Public Use" Restriction in Fifth Amendment's Takings Clause—United States Supreme Court Cases, 10 A.L.R. Fed. 2d 407.
What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d 231.

2 Ga.—Coffee v. Atkinson County, 236 Ga. 248, 223 S.E.2d 648 (1976).
Ill.—Morton Grove Park Dist. v. American Nat. Bank & Trust Co. of Chicago, 39 Ill. App. 3d 426, 350 N.E.2d 149 (1st Dist. 1976).
N.Y.—First Broadcasting Corp. v. City of Syracuse, 78 A.D.2d 490, 435 N.Y.S.2d 194 (4th Dep't 1981).
Statutory safeguards
Procedural protections imposed by the Community Redevelopment Law, combined with the eminent domain statutory scheme, were constitutionally sufficient state law measures to safeguard property interests of an owner of land within allegedly blighted area.
Cal.—Community Youth Athletic Center v. City of National City, 220 Cal. App. 4th 1385, 164 Cal. Rptr. 3d 644 (4th Dist. 2013), review denied, (Feb. 11, 2014).

3 Nev.—Schrader v. Third Judicial Dist. Ct. in and for Eureka County, 58 Nev. 188, 73 P.2d 493 (1937).
Tex.—National Ass'n of Audubon Societies v. Arroyo Colorado Nav. Dist. of Cameron and Willacy Counties, 110 S.W.2d 150 (Tex. Civ. App. San Antonio 1937).
Description of right condemned
Description in judgment of condemnation for telegraph line along railroad right of way, satisfying state law under state decisions, although not fixing exact location of line, judgment allowing only one line, and requiring it to be where it will not interfere with use of railroad, and to be subject to agreement in petition to change its location if required by change in tracks, is not bad under Fourteenth Amendment.

U.S.—Louisville & N.R. Co. v. Western Union Telegraph Co., 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919).

Petition requirements

To ensure due process to property owner, statute setting forth requirements for condemnation petition must be strictly conformed to by condemning body.

Ga.—Department of Transp. v. Whitfield, 233 Ga. App. 747, 505 S.E.2d 247 (1998).

4 Conn.—McCarthy v. City of Bridgeport, 21 Conn. App. 359, 574 A.2d 226 (1990).

5 U.S.—Backus v. Fort St. Union Depot Co., 169 U.S. 557, 18 S. Ct. 445, 42 L. Ed. 853 (1898).

Okla.—Nichols v. Oklahoma City, 1945 OK 66, 195 Okla. 305, 157 P.2d 174 (1945).

Wyo.—Miller v. Hagie, 59 Wyo. 383, 140 P.2d 746 (1943).

6 U.S.—Marchant v. Pennsylvania R. Co., 153 U.S. 380, 14 S. Ct. 894, 38 L. Ed. 751 (1894).

Conn.—Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

7 La.—Michel v. State, Div. of Administrative Law, 2013-1419 La. App. 1 Cir. 11/3/14, 2014 WL 5558478 (La. Ct. App. 1st Cir. 2014).

R.I.—Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006).

Predeprivation hearing not constitutionally required

Since the "unique safeguards" required by the Takings Clause provide adequate protection to property owners, due process does not require governmental entities to conduct predeprivation hearings before "taking" private property for a public use.

U.S.—Whittaker v. County of Lawrence, 674 F. Supp. 2d 668 (W.D. Pa. 2009), judgment aff'd, 437 Fed. Appx. 105 (3d Cir. 2011).

8 U.S.—Roberts v. City of New York, 295 U.S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 (1935).

Failure or neglect to assert rights

Person having interest in property taken by eminent domain cannot appear in condemnation proceedings and then neglect or fail to assert his or her rights and contend that there has been a denial of due process because no award of compensation is made.

Mich.—In re Condemnation of Lands in City of Battle Creek for Park Purposes, 341 Mich. 412, 67 N.W.2d 49 (1954).

Mere error of fact

Where proceedings for condemnation and assessment are under valid statute, on notice and hearing, mere error of fact in determining amount of compensation does not constitute lack of due process.

U.S.—Appleby v. City of Buffalo, 221 U.S. 524, 31 S. Ct. 699, 55 L. Ed. 838 (1911).

Postponing discussion

No constitutional right under Fourteenth Amendment is infringed when state court, in suit to have a judgment of condemnation for telegraph line along railroad held void, on ground that state law allows condemnation only for new line and that company wanted the right for old line, postpones discussion until attempt is made to use it for old line, the judgment of condemnation being right on its face.

U.S.—Louisville & N.R. Co. v. Western Union Telegraph Co., 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919).

Sovereign not continuing guarantor

Due process does not require sovereign to act as continuing guarantor of correctness of condemnation proceedings, nor to pay compensation to party who is later proven to be true owner.

Md.—Bugg v. Maryland Transp. Authority, 31 Md. App. 622, 358 A.2d 562 (1976).

9 U.S.—Roberts v. City of New York, 295 U.S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 (1935).

Mont.—Montana Power Co. v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969).

10 Ill.—City of Chicago v. Cohn, 326 Ill. 372, 158 N.E. 118, 55 A.L.R. 196 (1927).

Va.—Rudacille v. State Commission on Conservation and Development, etc., 155 Va. 808, 156 S.E. 829 (1931).

11 U.S.—Uihlein v. City of St. Paul, 32 F.2d 748 (C.C.A. 8th Cir. 1929).

N.Y.—In re City of Rochester, 184 A.D. 369, 171 N.Y.S. 12 (4th Dep't 1918), aff'd, 224 N.Y. 659, 121 N.E. 859 (1918).

Due process as including right to appeal to courts

An owner's right to due process in the civil forfeiture of a video gaming machine is satisfied when he is given a postseizure hearing before a magistrate to determine legality of the machine, with the right to appeal that ruling to circuit and appellate courts.

S.C.—Mims Amusement Co. v. South Carolina Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005).

Postdeprivation judicial review as adequate

Due process was satisfied where owner could raise issue of public use in its appeal from a trial court order granting the taking or bring a collateral action seeking declaratory or injunctive relief.

R.I.—Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006).

Notice of time for appeal

Statute providing for appeal to district court within 30 days after decision of board of county commissioners to establish road does not violate Due Process Clause as providing no public record affording means of ascertaining when time for appeal begins to run, where another statute provides that all minutes of board of county commissioners are public and requires proceedings of such board to be published in county newspaper.

U.S.—North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925).

12 La.—Terrebonne Parish Police Jury v. Matherne, 405 So. 2d 314 (La. 1981).

13 S.C.—Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746 (1937) (overruled on other grounds by, McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741, 25 Ed. Law Rep. 656 (1985)).

14 Wis.—Brown v. County State Road and Bridge Committee, 182 Wis. 480, 196 N.W. 860 (1924).

15 Ind.—Southern Indiana Gas & Elec. Co. v. City of Boonville, 215 Ind. 552, 20 N.E.2d 648 (1939).

16 N.Y.—In re City of Rochester, 100 Misc. 421, 165 N.Y.S. 1026 (Sup 1917), rev'd on other grounds, 184 A.D. 925, 170 N.Y.S. 1072 (4th Dep't 1918), aff'd, 224 N.Y. 386, 121 N.E. 102 (1918).

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16D C.J.S. Constitutional Law § 2066

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

2. Eminent Domain; Condemnation

b. Requisites and Sufficiency of Condemnation Procedure

§ 2066. Notice and opportunity to be heard prior to private property taking

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4077

A property owner whose property is targeted for taking by a public body does not have a Federal Constitutional right to participate in the legislative decision to take its property, but the owner at some point must be given notice and an opportunity to challenge the validity of the taking or the extent of compensation.

The power of eminent domain must be exercised in satisfaction of due process,[1] including adequate notice and the opportunity to be heard.[2] However, due process of law does not require notice to the owner and a judicial determination of the validity of the taking in advance of the taking so long as there exists an adequate mechanism for obtaining compensation.[3] In fact, it is not essential to due process of law that a condemnation procedure make any provision for a determination of the validity of the condemnation[4] because such a determination may be left to a separate suit,[5] such as one for injunction, ejectment, or other available remedies.[6] Thus, a property owner whose property is targeted for taking by a public body does not have a federal constitutional right to participate in the legislative decision to take his or her property, and a court proceeding to challenge the validity of the taking or the extent of compensation provides the process that is due under the Federal Constitution.[7]

Furthermore, if the court enters an order or judgment to the effect that there has been compliance with the statutory provisions, and reciting that title has vested in the condemnor, and providing for possession by the condemnor, the fact that such order or judgment is entered ex parte does not make the order or judgment violative of due process of law[8] since the condemnor obtains only a defeasible title to the property and a defeasible right of possession, both to be defeated on a showing that the taking was not for a public use.[9] If it is ultimately determined that the taking of the property was affected with fraud or bad faith, the declaration of taking would be a nullity, ineffectual to vest title in the condemnor, and any judgment or order entered thereupon would also be a nullity.[10]

Requirements for notice and hearing in the course of condemnation are often set out in statute.[11] The requirements of due process of law generally are fulfilled if the owner of the property taken is given reasonable notice of the proceedings and a reasonable opportunity to be heard respecting his or her rights before the entry of a final decree or award of condemnation.[12] If the statute provides ineffective due process protection, a property owner's due process rights may be protected by the court, such as where it continues a hearing to provide the property owner adequate time to hire an appraiser and prepare for trial on the issue of just compensation.[13]

All persons are charged with knowledge of statutory provisions as to condemnation proceedings and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it,[14] and consequently, in a condemnation proceeding, a notice, as provided by statute, is sufficient under the due process of law clause, even though it is constructive or indirect, if the period of the notice and the method of giving it are reasonably adapted to the proceedings and subject matter, and afford the property owner a reasonable opportunity at some stage of the proceedings to protect his or her property from an arbitrary or unjust appropriation.[15] Notice is not reasonable where the city has knowledge of the owner's correct address and fails to even attempt to personally serve the owner with notice of condemnation or the commissioners' hearings.[16]

In accordance with this rule, notice by publication may be sufficient,[17] but the notice must be reasonably designed to inform parties of an action which might adversely affect their interest,[18] and publication is not adequate where there is no reasonable explanation why personal notice cannot be delivered.[19] Accordingly, notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.[20]

A procedure which brings together in one condemnation suit the claims of a number of different owners to a number of different tracts of land is a denial of due process of law if the result is to restrict or prevent each owner from establishing his or her particular claim.[21]

Necessity for judicial hearing.

Due process requires that property owners be given some form of judicial hearing regarding authority of state subdivision to condemn, whether taking serves public purpose, and amount of compensation, but not with respect to condemnor's determination as to necessity and expediency of taking.[22]

Footnotes

1 § 2062.

2 Miss.—Webb v. Town Creek Master Water Management Dist. of Lee, Pontotoc, Prentiss and Union Counties, 903 So. 2d 701 (Miss. 2005).

To owners of record

To comport with due process, property owners of record must be given notice and an opportunity to be heard in the condemnation action.

N.D.—Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Tp., 2002 ND 83, 643 N.W.2d 685 (N.D. 2002).

As to the necessity of notice and hearing in eminent domain proceedings, generally, see C.J.S., Eminent Domain § 312.

3 U.S.—Rex Realty Co. v. City of Cedar Rapids, 322 F.3d 526 (8th Cir. 2003).

Necessity and expediency of the taking

When a statute authorizes a taking of private property for public use, the necessity and expediency of such taking may be determined in such mode as the state may designate.

Pa.—Weinberg v. Comcast Cablevision of Philadelphia, L.P., 2000 PA Super 258, 759 A.2d 395 (2000).

4 Neb.—May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

5 Neb.—May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

In separate suit

One whose property is sought to be condemned cannot complain of not being given a hearing on right to condemn because referred for that hearing, under state law, to different suit from that in which value of property is fixed.

U.S.—Louisville & N.R. Co. v. Western Union Telegraph Co., 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919).

6 U.S.—Rex Realty Co. v. City of Cedar Rapids, 322 F.3d 526 (8th Cir. 2003).

7 U.S.—Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd., 898 F. Supp. 1302 (S.D. Ind. 1995).

Due process requirements applicable to legislative action

Ordinarily, due process of law requires an opportunity for some kind of hearing prior to the deprivation of a significant property interest; however, when the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law.

U.S.—Samson v. City of Bainbridge Island, 683 F.3d 1051 (9th Cir. 2012).

8 U.S.—U.S. v. 72 Acres of Land, More or Less, Situate in City of Oakland, Alameda County, 37 F. Supp. 297 (N.D. Cal. 1941).

Recovery of excess payment by government

U.S.—U.S. v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55 (1943).

9 Va.—City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950).

10 U.S.—U.S. v. 72 Acres of Land, More or Less, Situate in City of Oakland, Alameda County, 37 F. Supp. 297 (N.D. Cal. 1941).

11 N.Y.—Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Development Agency, 301 A.D.2d 292, 750 N.Y.S.2d 212 (4th Dep't 2002).

12 U.S.—Bragg v. Weaver, 251 U.S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919); Nikolas v. City of Omaha, 605 F.3d 539 (8th Cir. 2010); Elsmere Park Club, L.P. v. Town of Elsmere, 474 F. Supp. 2d 638 (D. Del. 2007), aff'd, 542 F.3d 412 (3d Cir. 2008); Gallant v. City of Fitchburg, 739 F. Supp. 2d 39 (D. Mass. 2010).

Neb.—American Cent. City, Inc. v. Joint Antelope Valley Authority, 281 Neb. 742, 807 N.W.2d 170 (2011).

N.C.—New Hanover County Water and Sewer Dist. v. Thompson, 193 N.C. App. 404, 667 S.E.2d 501 (2008).

Evidence

It does not deny due process in an eminent domain proceeding to cut off a litigant's right to present evidence where the party fails to comply with established evidentiary standards for appraisal methods. Thus, when a valuation expert employs an unsanctioned methodology, the opinion may be excluded in part or in whole in the discretion of the trial court.

Cal.—City of Stockton v. Albert Brocchini Farms, Inc., 92 Cal. App. 4th 193, 111 Cal. Rptr. 2d 662 (3d Dist. 2001).

13 Miss.—Branaman v. Long Beach Water Management Dist., 730 So. 2d 1146 (Miss. 1999).

14 **Time for objection**

A statute requiring objection to establishment of road to be filed within 30 days after determination of board of commissioners to establish road is not unreasonable so as to violate due process of law guaranty.
U.S.—North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925).

15 U.S.—North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925).
Nev.—State ex rel. Department of Highways v. Pinson, 66 Nev. 227, 207 P.2d 1105 (1949).

16 N.J.—City of Passaic v. Shennett, 390 N.J. Super. 475, 915 A.2d 1092 (App. Div. 2007).

17 U.S.—North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925).
N.Y.—De Vito v. City of Troy, 72 A.D.2d 866, 421 N.Y.S.2d 719 (3d Dep't 1979).

Compensation not determined

Notice by publication did not violate property owner's basic due process rights where notice complained of involved city's decision to acquire property rather than determination of just compensation.
N.Y.—Legal Aid Soc. of Schenectady County, Inc. v. City of Schenectady, 78 A.D.2d 933, 433 N.Y.S.2d 234 (3d Dep't 1980).

18 U.S.—Miles v. District of Columbia, 354 F. Supp. 577 (D.D.C. 1973), judgment aff'd, 510 F.2d 188 (D.C. Cir. 1975).

19 U.S.—Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).

20 U.S.—Brody v. Village of Port Chester, 509 F. Supp. 2d 269 (S.D. N.Y. 2007).

21 U.S.—Gwathmey v. U.S., 215 F.2d 148 (5th Cir. 1954).

22 U.S.—Tioronda, LLC. v. New York, 386 F. Supp. 2d 342 (S.D. N.Y. 2005).

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§ 2067. Assessment and payment of compensation for taking property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4077

Due process of law generally does not require that the compensation or damages in condemnation proceedings be assessed by a jury, particularly if the right to a just compensation is protected by a provision for an appeal to the court from an assessment.

In determining whether the statutory procedure for the assessment of damages in condemnation proceedings meets with the requirements of due process of law, the remedies provided must be considered as a whole, and due process will not depend on the procedure which is provided for the initial appraisement only.[1] The fact that a statute does not specify the elements to be considered in determining just compensation does not constitute a denial of due process.[2]

Due process of law, generally, does not require that the compensation or damages in condemnation proceedings be assessed by a jury.[3] It is sufficient that compensation is assessed by a special tribunal or officers appointed by the court,[4] or appraisers or commissioners appointed by a board or tribunal to discharge the function,[5] particularly where the right to a just compensation

is protected by a provision for an appeal to the court from such an assessment.[6] However, it is not a denial of due process of law that the determination of the compensation to be paid is to be made by a jury, even though some other method of determination might be more appropriate.[7]

Due process of law is not denied where the constituent elements in estimating the measure of damages are considered and applied;[8] nor is it denied because of the inadequacy of the compensation allowed where no procedural right is denied and the evidence supports the verdict.[9]

It is not a denial of due process of law to refuse to assess separately the different interests or estates in the property taken, where there is no evidence that the damages to the various interests would exceed the value of the property as a whole,[10] except that separate owners of separate tracts of land are entitled to have their separate tracts assessed separately and not in a lump sum.[11]

The due process of law guaranty is not violated by a statute making a confirmed award final and conclusive as to the amount of the damages and permitting a review only on questions of jurisdiction, fraud, and misconduct.[12]

Remediation costs as element in assessing compensation.

Evidence of remediation costs is not admissible in an eminent domain proceeding involving environmentally contaminated property even though exclusion of such evidence may result in a valuation greater than fair market value; "just compensation" is not obtained when property owners are subjected to the risk of double liability under environmental liability laws and condemnation proceedings, and admission of such evidence violates due process by permitting condemning authority to recoup remediation costs through reduced condemnation award while circumventing statutory procedures established for the recovering of environmental remediation costs.[13]

Burden of proof.

Placing the burden of proof as to just compensation on the landowners, even though the appeal is by the condemnor, does not deny due process.[14]

Footnotes

1 Ind.—Southern Indiana Gas & Elec. Co. v. City of Boonville, 215 Ind. 552, 20 N.E.2d 648 (1939).

2 U.S.—Cahill v. Cedar County, Iowa, 367 F. Supp. 39 (N.D. Iowa 1973), judgment aff'd, 419 U.S. 806, 95 S. Ct. 21, 42 L. Ed. 2d 35 (1974).

3 U.S.—U.S. v. Meyer, 113 F.2d 387 (C.C.A. 7th Cir. 1940).
As to assessment of compensation in eminent domain cases, generally, see C.J.S., Eminent Domain §§ 374 to 505.

4 Mich.—Fitzsimmons & Galvin v. Rogers, 243 Mich. 649, 220 N.W. 881 (1928).
Properly qualified tribunal
Ind.—Southern Indiana Gas & Elec. Co. v. City of Boonville, 215 Ind. 552, 20 N.E.2d 648 (1939).

5 Kan.—Miller v. Bartle, 283 Kan. 108, 150 P.3d 1282 (2007).
Okla.—State ex rel. Department Of Transp. v. Post, 2005 OK 69, 125 P.3d 1183 (Okla. 2005).
Court had discretion to deny jury trial and resort to standing land commission to decide compensation
U.S.—National Railroad Passenger Corp. v. Catalina Enterprises, Inc. Pension Trust, 147 Fed. Appx. 378 (4th Cir. 2005).

6 U.S.—Bailey v. Anderson, 326 U.S. 203, 66 S. Ct. 66, 90 L. Ed. 3 (1945).
S.C.—South Carolina Nat. Bank v. Central Carolina Livestock Market, Inc., 289 S.C. 309, 345 S.E.2d 485 (1986).

7 Ark.—City of Helena v. Arkansas Utilities Co., 208 Ark. 442, 186 S.W.2d 783 (1945).

8 U.S.—Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934).
Determining quantity of land
U.S.—U.S. v. Lee, 360 F.2d 449 (5th Cir. 1966).

9 Cal.—San Mateo County v. Christen, 22 Cal. App. 2d 375, 71 P.2d 88 (1st Dist. 1937).

10 Mo.—State ex rel. McCaskill v. Hall, 325 Mo. 165, 28 S.W.2d 80, 69 A.L.R. 1256 (1930).

11 Ohio—Scott v. City of Columbus, 109 Ohio St. 193, 2 Ohio L. Abs. 5, 142 N.E. 25 (1923).

12 U.S.—Crane v. Hahlo, 258 U.S. 142, 42 S. Ct. 214, 66 L. Ed. 514 (1922).

13 Minn.—Moorhead Economic Development Authority v. Anda, 789 N.W.2d 860 (Minn. 2010).

14 Wis.—Berg v. Board of Regents of State Universities, 40 Wis. 2d 657, 162 N.W.2d 653 (1968).

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16D C.J.S. Constitutional Law § 2068

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

2. Eminent Domain; Condemnation

b. Requisites and Sufficiency of Condemnation Procedure

§ 2068. Assessment and payment of compensation for taking property—Time for payment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4077

Due process of law does not require that the compensation for property taken by condemnation be paid in advance of the taking, but it does require that the compensation be paid within a reasonable time after the taking.

Due process of law does not require that where property is taken under the power of eminent domain compensation for the property must be paid in advance of the taking,[1] but it is recognized that a statute which authorizes the taking of property without the payment of compensation within a reasonable time is a denial of due process of law.[2] So, in order to satisfy due process of law, there must be provision for the ascertainment and payment of compensation within a reasonable time, or without unreasonable delay,[3] but this does not prevent the condemnor from taking immediate possession of the property on completion of the required statutory procedure, as by filing a declaration of taking,[4] or by making such deposits as are necessary to cover the estimated compensation or damages.[5]

It is unclear from the cases as to what constitutes a reasonable time for the payment of compensation,[6] but if there is a reasonable basis for postponing the time of the determination and payment of compensation, ordinarily a legislative determination of what such time is will not be unconstitutional.[7] Thus, it does not constitute a denial of due process for the legislature to provide that compensation will be determined and paid after a reasonable time has elapsed for the completion of the work on the property,[8] but it is a denial of due process if the compensation is not to be determined and paid until after the work has been completed.[9] Moreover, a delay of eight years between the filing of a condemnation action and payment of the judgment constitutes a substantial delay entitling the property owners to have the just compensation issue addressed by the court.[10]

The constitutional guaranty of due process is satisfied if the owner of the property has the right to initiate proceedings to compel the condemnor to determine and pay compensation within a reasonable time after the taking of the property.[11] A constitutional provision that private property should not be taken for public use until compensation has been made or secured is satisfied if compensation is secured before the property is taken.[12] If there is a subsequent appraisal of damages by commissioners appointed by the court, actual payment may be made months or even years after the taking.[13]

A condemnation judgment whereby the state acquires title to property and assumes the payment of bonds secured by a first mortgage on the property is not violative of due process because it does not provide for the payment of the bonds before the taking of the property.[14]

Retroactive application of statute of limitations.

Retroactive application of an amended limitations period, changed from five years to one, did not deprive condemnees of a fundamental right, without due process, as to just compensation for county redevelopment authority's taking of their property by eminent domain because the condemnees did not have a vested constitutional right in a limitations period and were afforded a reasonable time in which to file a petition challenging the amount of just compensation they received.[15]

Footnotes

1 U.S.—Bailey v. Anderson, 326 U.S. 203, 66 S. Ct. 66, 90 L. Ed. 3 (1945); Kurtz v. Verizon New York, Inc., 758 F.3d 506 (2d Cir. 2014); Sorrentino v. Godinez, 777 F.3d 410 (7th Cir. 2015).
Ark.—Wilmoth v. Southwest Arkansas Utilities Corporation, 2015 Ark. App. 185, 2015 WL 1172058 (2015).
As to the payment of compensation in eminent domain cases, generally, see C.J.S., Eminent Domain §§ 202 to 218.

2 W. Va.—McGibson v. Roane County Court, 95 W. Va. 338, 121 S.E. 99 (1924).

3 U.S.—Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).
Va.—City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950).
Pledging taxing power
Pledge of school district's taxing power was sufficient security to pay condemnee just compensation and to fulfill requirements of due process.
Pa.—In re School Dist. of Haverford Tp., 437 Pa. 536, 264 A.2d 679 (1970).

4 U.S.—City of Oakland v. U.S., 124 F.2d 959 (C.C.A. 9th Cir. 1942).

5 U.S.—City of Oakland v. U.S., 124 F.2d 959 (C.C.A. 9th Cir. 1942).
Cal.—Peck v. Superior Court of Colusa County, 138 Cal. App. 222, 31 P.2d 1042 (3d Dist. 1934).

6 W. Va.—Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331, 113 A.L.R. 787 (1937) (overruled in part on other grounds by, State Road Commission v. Milam, 146 W. Va. 368, 120 S.E.2d 254 (1961)).

7 W. Va.—Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331, 113 A.L.R. 787 (1937) (overruled in part on other grounds by, State Road Commission v. Milam, 146 W. Va. 368, 120 S.E.2d 254 (1961)).

8 W. Va.—Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331, 113 A.L.R. 787 (1937) (overruled in part on other grounds by, State Road Commission v. Milam, 146 W. Va. 368, 120 S.E.2d 254 (1961)).

Change in physical condition of property

It is not denial of due process that property which has been taken by eminent domain is entered upon by condemnor and its physical condition changed before commissioners are appointed who are to view the property to ascertain its value for condemnation purposes.

U.S.—Bailey v. Anderson, 326 U.S. 203, 66 S. Ct. 66, 90 L. Ed. 3 (1945).

9 W. Va.—McGibson v. Roane County Court, 95 W. Va. 338, 121 S.E. 99 (1924).

10 Ill.—Forest Preserve Dist. of Du Page County v. First Nat. Bank of Franklin Park, 401 Ill. App. 3d 966, 341 Ill. Dec. 267, 930 N.E.2d 477 (2d Dist. 2010), judgment aff'd, 2011 IL 110759, 356 Ill. Dec. 386, 961 N.E.2d 775 (Ill. 2011).

11 W. Va.—McGibson v. Roane County Court, 95 W. Va. 338, 121 S.E. 99 (1924).

Proceedings by either party

Either landowner or condemnor could institute appropriate proceedings at law to compel commissioners to perform their legal duties if they delayed unreasonably in performing them.

Del.—Carpenter v. Du Pont, 31 Del. Ch. 80, 66 A.2d 602 (1949).

12 Nev.—McCarran Intern. Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006).

13 Mich.—Petition of State Highway Com'r, 279 Mich. 285, 271 N.W. 760 (1937).

14 Ark.—White River Bridge Corp. v. State, 192 Ark. 485, 92 S.W.2d 856 (1936).

15 Pa.—McDonald v. Redevelopment Authority of Allegheny County, 952 A.2d 713 (Pa. Commw. Ct. 2008).

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16D C.J.S. Constitutional Law § 2069

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

3. Taking Property for Private Use

§ 2069. Governmental taking of private property for private use

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4071, 4077

It is a violation of the guaranty of due process of law to take the private property of one person or corporation, without the owner's consent, for the private use of another.

The taking of the private property of one person or corporation, without the owner's consent, for the private use of another,[1] even though accompanied by full or just compensation,[2] is a violation of the guaranty of due process of law except where the private purpose for which the property is taken is so intimately connected with public necessity and welfare that it constitutes at least a quasi-public use.[3] Private property may be taken for a way of necessity in some circumstances[4] although some courts have held that the taking of private property for private ways of necessity is a violation of due process.[5] A state constitution may provide additional protection to the owner of private property by limiting the definition of private use beyond the interpretation given that term under the Federal Constitution.[6] A state constitution may alternatively limit the right of eminent domain so that it cannot be exercised for the purpose of acquiring property for private use and may forbid the legislature from exercising eminent domain or delegating its exercise except for public uses.[7]

The transfer of titles in real property from lessors to lessees, pursuant to a state statute in order to reduce concentration of land ownership does not violate due process, as regulating oligopoly and the evils associated with it is a classic exercise of a state's police powers, and the statute's approach to correcting the land oligopoly problem, by the redistribution of fees simple, was a rational means of accomplishing this public purpose through eminent domain.[8]

Railroad.

A railroad company may not be required to surrender a portion of its right of way to a private person for an elevator,[9] or to permit its yards to be used constantly by a private mine operator for the loading of cars to the detriment of its own business,[10] or to furnish hospital facilities to its employees for illnesses and accidents, whether or not the illnesses or accidents arise out of or in the course of employment.[11] On the other hand, it has been held that it may, under certain circumstances, be required to construct a spur track for the use of a private shipper,[12] or a part of its property may be taken, under eminent domain, by a private railroad company for a cross-over.[13]

It has also been held that a person owning shares of stock in a railroad corporation is not deprived of any property or right by the condemnation of his or her shares of stock by another railroad corporation.[14] A provision for reversion to the owner of land taken for a right of way, by a railroad which has done no construction for eight years, is not a taking of private property since the easement itself is coexistent only with the use for which it was acquired.[15]

CUMULATIVE SUPPLEMENT

Cases:

"Government-mediated private taking" is one in which the government simply acts as a middleman who transfers the property from one set of private hands to another. U.S.C.A. Const.Amends. 5, 14. Rancho de Calistoga v. City of Calistoga, 800 F.3d 1083 (9th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).
S.D.—City of Rapid City v. Finn, 2003 SD 97, 668 N.W.2d 324 (S.D. 2003).
Tex.—Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012).
Primarily benefiting private persons or uses
In gauging the constitutionality of a proposed condemnation, courts must determine whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used.
N.H.—In re Pennichuck Water Works, Inc., 160 N.H. 18, 992 A.2d 740 (2010).
Taking as a subterfuge
A condemning authority's proposed taking is improper if it is merely a subterfuge for a private use.
Ind.—Wymberley Sanitary Works v. Batliner, 904 N.E.2d 326 (Ind. Ct. App. 2009).
A.L.R. Library

Application of Kelo v. City of New London, Conn., 125 S. Ct. 2655, 162 L. Ed. 2d 439, 60 Env't. Rep. Cas. (BNA) 1769, 35 Envtl. L. Rep. 20134, 10 A.L.R. Fed. 2d 733 (U.S. 2005), to "Public Use" Restrictions in Federal and State Constitutions Takings Clauses and Eminent Domain Statutes, 21 A.L.R.6th 261.

2 U.S.—Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).

Ala.—Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1 (Ala. 2012), as modified on denial of reh'g, (Sept. 27, 2013).

Pa.—Adelphia Cablevision Associates of Radnor, L.P. v. University City Housing Co., 755 A.2d 703 (Pa. Super. Ct. 2000).

Tex.—In re Knott, 118 S.W.3d 899 (Tex. App. Texarkana 2003).

3 U.S.—Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).

Minn.—Housing and Redevelopment Authority in and for the City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. Ct. App. 2001), aff'd on other grounds, 641 N.W.2d 885 (Minn. 2002).

Incidental private benefit

Under constitutional provision generally prohibiting private takings, the distinction between a public use and a private use is not based on actual use or occupation of the property by the public, and the fact that private parties benefit from a taking does not eliminate the public character of the taking so long as there is some benefit to "any considerable number" of the public.

Mo.—Labrayere v. Bohr Farms, LLC, 2015 WL 1735494 (Mo. 2015).

Charter school constituted a public rather than a private use of condemned land.

Pa.—Bear Creek Tp. v. Riebel, 37 A.3d 64, 277 Ed. Law Rep. 320 (Pa. Commw. Ct. 2012).

Permissible extent of private benefit

(1) A taking can be for "public use" or benefit even when there is also a substantial private use, so long as the private use in question is incidental to the paramount public use.

N.C.—Catawba County v. Wyant, 197 N.C. App. 533, 677 S.E.2d 567 (2009).

(2) The mere fact that a private actor will benefit from a taking of property for public use does not transform the purpose of the taking of the property, or the means used to implement that purpose, from a public to a private use for purposes of constitutional provision prohibiting the taking of private property for a purely private purpose.

Tex.—Cascott, L.L.C. v. City of Arlington, 278 S.W.3d 523 (Tex. App. Fort Worth 2009).

4 Colo.—Glenelk Ass'n, Inc. v. Lewis, 260 P.3d 1117 (Colo. 2011).

Mo.—City of Kansas City v. Hon, 972 S.W.2d 407 (Mo. Ct. App. W.D. 1998).

Wyo.—Wyoming Resources Corp. v. T-Chair Land Co., 2002 WY 104, 49 P.3d 999 (Wyo. 2002).

5 Mich.—Tolksdorf v. Griffith, 464 Mich. 1, 626 N.W.2d 163 (2001).

Mont.—McCabe Petroleum Corp. v. Easement and Right-of-Way Across Tp. 12 North, Range 23 East, 2004 MT 73, 320 Mont. 384, 87 P.3d 479 (2004).

Statutory provision for easement

Where owner has no practicable means of access to his or her property except over property of adjoining landowner, statute which authorized use of easement over such adjoining land amounts to taking from one private owner for benefit of another private owner and constitutes deprivation of property without due process of law.

Fla.—South Dade Farms, Inc. v. B. & L. Farms Co., 62 So. 2d 350 (Fla. 1952).

6 Wash.—Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).

7 Ark.—Smith v. Arkansas Midstream Gas Services Corp., 2010 Ark. 256, 377 S.W.3d 199 (2010).

8 U.S.—Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

9 U.S.—Missouri Pac. Ry. Co. v. State of Nebraska, 164 U.S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896).

Neb.—Chicago, B. & Q.R. Co. v. State, 50 Neb. 399, 69 N.W. 955 (1897).

10 U.S.—Harp v. Choctaw, O. & G. Ry. Co., 118 F. 169 (C.C.W.D. Ark. 1902), aff'd, 125 F. 445 (C.C.A. 8th Cir. 1903).

11 Okla.—St. Louis-San Francisco Ry. Co. v. State, 1953 OK 335, 268 P.2d 845 (Okla. 1953).

12 Wash.—State v. Public Service Com'n, 77 Wash. 529, 137 P. 1057 (1914).

After hearing

An order of railroad commission that railroad construct spur track to connect with another's plant, in part at its own expense, made after hearing with appeal, does not constitute taking of property without due process of law.

Minn.—Range Sand Line Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N.W. 656 (1917).

13 Wash.—State v. Superior Court for Grays Harbor County, 155 Wash. 651, 286 P. 33 (1930).

14 N.J.—In re Paterson & Hudson River R. Co., 11 N.J. 403, 94 A.2d 657 (1953).

15 Iowa—Skillman v. Chicago, M. & St. P. Ry. Co., 78 Iowa 404, 43 N.W. 275 (1889).

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16D C.J.S. Constitutional Law § 2070

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

B. Confiscation of Property; Eminent Domain; Taking for Private Use

3. Taking Property for Private Use

§ 2070. Government authorization of sale of private property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3855, 4057, 4071, 4077, 4090, 4339, 4389, 4446, 4475

Legislation which permits the sale of property of persons who are under disabilities is usually not in denial of due process of law.

The legislature, acting as the guardian and protector of those not competent to act for themselves, may by general or private laws, without violating the Due Process Clause, authorize the sale or other disposition of their property for the purpose of protecting their interests[1] and may so control the estates of infants,[2] insane persons,[3] and others who are incapacitated.[4] Sales of property may also be authorized for the benefit of creditors[5] and for the purpose of partition of property that is not capable of partition in kind.[6]

The power of the legislature to authorize the sale of property held in trust or of property in which there are interests in remainder, without the consent of the cestui que trust or remainderman, has been sustained by some authorities,[7] but by others has been denied, as effecting a taking of private property without due process.[8] However, in the absence of special grounds, such as the

protection of persons under disabilities or necessity for the purpose of doing justice, a legislative act authorizing the property of one person to be sold and the title thus vested in another is void as a taking without due process of law.[9]

Evidence of ownership lost.

Where all evidence of ownership is lost, the State may constitutionally dispose of the property.[10] In order to be constitutional, and to comport with due process, escheats must give notice to potential claimants after the State acquires the funds and provide for an administrative and judicial hearing to adjudicate these claims.[11] Moreover, a state controller is required to provide preescheat notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action to seize "unclaimed property" and afford them an opportunity to present their objections.[12]

Property and franchises of corporation.

A lease of all the property and franchises of a corporation made by a majority of the stockholders under statutory authority does not constitute a taking of the property of minority or dissenting stockholders without due process of law.[13] A reverse stock split and fractional share buyout of minority shareholders, as authorized by statute, is not an unconstitutional taking of private property where the statutory provisions authorizing such actions are embodied in the corporation's articles of incorporation, demonstrating the shareholders' consent to the buyout.[14]

A president of a corporation that operated upscale restaurant did not have protectable property interest in business assets of restaurant, and thus, any deprivation of those assets by county police officers, who allegedly harassed restaurant's operations, did not amount to procedural due process violation where assets belonged to corporation and not president individually.[15]

Footnotes

1 Ind.—Barton v. Kimmerley, 165 Ind. 609, 76 N.E. 250 (1905).

2 Mo.—Whittelsey v. Conniff, 266 Mo. 567, 182 S.W. 161, 1 A.L.R. 913 (1916).
Unborn contingent remaindermen
Statute providing for sale or lease of lands subject to contingent remainders in persons yet unborn, where all persons in being having any vested, contingent, or expectant estate or interest are made parties, and proceeds of sale or lease are substituted for lands, does not deprive unborn remaindermen of their property without due process of law.
W. Va.—Geary v. Butts, 84 W. Va. 348, 99 S.E. 492 (1919).

3 Tenn.—Monds v. Dugger, 176 Tenn. 550, 144 S.W.2d 761 (1940).

4 Ind.—Kutzner v. Meyers, 182 Ind. 669, 108 N.E. 115 (1915).

5 Ala.—Holman's Heirs v. Bank of Norfolk, 12 Ala. 369, 1847 WL 403 (1847) (overruled in part on other grounds by, Burns v. Taylor, 23 Ala. 255, 1853 WL 247 (1853)) and (overruled in part on other grounds by, Doe ex dem. Hughes v. Wilkinson, 35 Ala. 453, 1860 WL 452 (1860)).

6 Iowa—Metcalf v. Hoopingardner, 45 Iowa 510, 1877 WL 462 (1877).

7 Conn.—Linsley v. Hubbard, 44 Conn. 109, 1876 WL 1763 (1876).

8 S.D.—Johnson v. Brauch, 9 S.D. 116, 68 N.W. 173 (1896).

9 N.Y.—People v. O'Brien, 111 N.Y. 1, 18 N.E. 692 (1888).

10 Me.—Kennebec Log Driving Co. v. Burrill, 18 Me. 314, 1841 WL 954 (1841).
Estates of absentees and persons presumed to be dead as affected by due process guaranty, see § 2391.

11 Tex.—Coleman v. Victoria County, 385 S.W.3d 608 (Tex. App. Corpus Christi 2012).

12 U.S.—Taylor v. Yee, 780 F.3d 928 (9th Cir. 2015).

13 U.S.—Dickinson v. Consolidated Traction Co., 114 F. 232 (C.C.D. N.J. 1902), aff'd, 119 F. 871 (C.C.A. 3d Cir. 1903).

14 Colo.—Goldman v. Union Bank and Trust, 765 P.2d 638 (Colo. App. 1988).

15 U.S.—Chrebet v. County of Nassau, 24 F. Supp. 3d 236 (E.D. N.Y. 2014).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

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Research References

A.L.R. Library

A.L.R. Index, Acquired Immune Deficiency Syndrome
A.L.R. Index, Animals
A.L.R. Index, Billboards and Outdoor Advertising
A.L.R. Index, Building and Construction
A.L.R. Index, Building Permits
A.L.R. Index, Constitutional Law
A.L.R. Index, Contagious or Communicable Diseases
A.L.R. Index, Garbage and Refuse
A.L.R. Index, Hazardous Substances and Waste
A.L.R. Index, Health
A.L.R. Index, Historic Landmarks
A.L.R. Index, Housing and Slum Clearance
A.L.R. Index, Landfills
A.L.R. Index, Pollution
A.L.R. Index, Septic Systems
A.L.R. Index, Sewers and Sewage
A.L.R. Index, Signs and Signals
A.L.R. Index, Zoning
West's A.L.R. Digest, Constitutional Law 3879, 3887, 4057, 4073, 4074, 4091 to 4096, 4320 to 4332

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16D C.J.S. Constitutional Law § 2071

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

a. In General

§ 2071. Due process application to health and environmental regulations, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4320, 4331

Constitutional guaranties against the deprivation of property without due process of law do not limit the reasonable exercise of the police power in matters of health and environmental protection.

Constitutional guaranties against the deprivation of property without due process of law do not limit the reasonable exercise of the police power in matters of health and environmental protection.[1] Moreover, there is no federal constitutional right to a healthful environment[2] giving rise to an action for damages.[3] The constitutional guaranty of due process must, however, generally yield to statutes and ordinances designed to promote the public health as part of the police powers of the state.[4] Moreover, in at least one state, the right to a clean and healthful environment constitutes a fundamental right under the state constitution.[5]

The enforcement of environmental laws, and of orders of designated officials promulgated pursuant to such statutes,[6] where not arbitrary or capricious,[7] does not constitute a denial of the constitutional guaranty of due process notwithstanding that a particular

operation cannot practically or feasibly meet minimum pollution standards set in particular rules and regulations.[8] Additionally, reasonable regulations prescribed pursuant to the authority of the state for the promotion of the public health, morals, safety, or welfare are valid even though they may have the effect of limiting the use or diminishing the value of private property.[9] The abatement of a nuisance for the public safety or health[10] or a direction by health authorities to correct conditions which constitute a nuisance[11] is not a denial of due process. Nevertheless, where a landowner contests the filing of an environmental lien arising out of a petroleum spill, due process requires that the agency expeditiously come forward with, at a minimum, substantial evidence supporting each element necessary for the lien.[12] On the other hand, if regulations purporting to protect public health do not have such a relation as tends to accomplish that purpose,[13] or are otherwise unreasonable in their invasions of the rights of private property,[14] they are void as a violation of the guaranty of due process of law.[15]

Environmental legislation and regulations,[16] and laws bearing an adequate relationship to the public health, safety, and general welfare,[17] are not exempt from the due process requirement of definiteness. Inasmuch as what is proscribed by an environmental protection statute is conduct violating any regulation or standard adopted by a designated administrative body, such a statute is not unconstitutional as being so vague and indefinite as to violate due process.[18] Furthermore, an agency drafting regulations is not required to write for the benefit of deliberately unsympathetic or wilfully obtuse readers: for purposes of due process, a governmental agency attempting to give notice to members of the public may assume a hypothetical recipient desirous of actually being informed.[19]

Substantive due process.

Allegations by property owners that Town Conservation Commission officials reached erroneous conclusions about owners' violations of conservation restrictions in bad faith did not state substantive due process claim against Commission officials.[20]

Environmental impact statements.

The preparation of environmental impact reports, or a determination that such report need not be filed, does not deprive owners in impacted areas, or members of the public, of property rights in a constitutional sense.[21]

CUMULATIVE SUPPLEMENT

Cases:

Environmental organization's asserted protectable property interest in clean and healthful environment as defined by environmental regulations necessitated due process hearing by Public Utilities Commission (PUC) to consider the greenhouse-gas-related impacts of approving electric utility company's power purchase agreement with electricity producer on the right of organization's members to clean and healthful environment; PUC's approval of agreement involved determinations related to State's renewable energy goals and by extension involved determination of members' interest in clean and healthful environment, risks of erroneous deprivation were high absent protections provided by hearing, and PUC would not be unduly burdened as it was statutorily required to consider long-term effects of its decisions. Haw. Const. Art. 1, § 5, Art. 11, § 9; Haw. Rev. Stat. § 269-6. In re Application of Maui Electric Company, Limited, 141 Haw. 249, 408 P.3d 1 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943).
Ill.—Spalding v. Granite City, 415 Ill. 274, 113 N.E.2d 567 (1953).
Denial of expansion of utility
Commission's order denying utility certificate of environmental compatibility and public need on basis of evidence that utility's proposed expansion plans will have greater than minimum adverse recreational impact is valid exercise of police power, and such order does not deprive utility of property without due process of law.
Ohio—Ohio Edison Co. v. Power Siting Commission, 56 Ohio St. 2d 212, 10 Ohio Op. 3d 371, 383 N.E.2d 588 (1978).

2 U.S.—In re Agent Orange Product Liability Litigation, 475 F. Supp. 928 (E.D. N.Y. 1979); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).
No due process right to be free from noise from airport
Property owners did not have property right recognized by state law to be free from noise from city airport and thus were not denied procedural due process due to city's alleged failure to follow appropriate procedures and to consider impact of various projects on their home and surrounding area.
U.S.—Bellocchio v. New Jersey Dept. of Environmental Protection, 16 F. Supp. 3d 367 (D.N.J. 2014).
Task of defining "deprivation"
Where deprivation is not obvious, task of defining "deprivation" as related to interest in a healthful environment is beyond competence of the court and is, instead, for the legislative branch.
U.S.—Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974).

3 U.S.—Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).

4 Ill.—Spalding v. Granite City, 415 Ill. 274, 113 N.E.2d 567 (1953).
La.—Chapman v. City of Shreveport, 225 La. 859, 74 So. 2d 142 (1954).

5 Mont.—State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037 (2010).

6 N.Y.—Diamond v. Martin-Deichsel Leather Co., 67 Misc. 2d 341, 323 N.Y.S.2d 531 (Sup 1971).
Pa.—Bortz Coal Co. v. Air Pollution Commission, 2 Pa. Commw. 441, 279 A.2d 388, 48 A.L.R.3d 311 (1971).
Stay pending variance proceedings
U.S.—U.S. v. West Penn Power Co., 460 F. Supp. 1305 (W.D. Pa. 1978).

7 Fla.—Farrugia v. Frederick, 344 So. 2d 921 (Fla. 1st DCA 1977).

8 Pa.—Bortz Coal Co. v. Air Pollution Commission, 2 Pa. Commw. 441, 279 A.2d 388, 48 A.L.R.3d 311 (1971).
A.L.R. Library
Air pollution control: validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 A.L.R.3d 326.

9 N.Y.—Jeffers v. Duffy, 52 A.D.2d 730, 382 N.Y.S.2d 159 (4th Dep't 1976).
Ohio—State ex rel. Schulman v. City of Cleveland, 8 Ohio Misc. 1, 37 Ohio Op. 2d 12, 220 N.E.2d 386 (C.P. 1966).
Density and uses of structures
Fla.—Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974).
Strip mining
Tenn.—Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981).
Fluoridation of public water supply
Minn.—Minnesota State Bd. of Health by Lawson v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976).
Restricting use of wetlands
Me.—State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970).

10 N.J.—Ajamian v. North Bergen Tp., 103 N.J. Super. 61, 246 A.2d 521 (Law Div. 1968), aff'd, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969).
As to summary abatement of nuisance as within the requirements of due process, generally, see § 1921.
Noise ordinance not unconstitutionally vague

A city ordinance prohibiting unreasonable noise that annoyed a reasonable person of normal sensitivities imposed an objective standard of conduct on its enforcement, and thus, the ordinance was not unconstitutionally vague in violation of due process even if enforcement would not be uniform and a police officer would be required to apply his or her judgment in determining a violation.
U.S.—Munn v. City of Ocean Springs, Miss., 763 F.3d 437 (5th Cir. 2014).

Noise pollution

Ill.—Ferndale Heights Utilities Co. v. Illinois Pollution Control Bd., 44 Ill. App. 3d 962, 3 Ill. Dec. 539, 358 N.E.2d 1224 (1st Dist. 1976).

11 N.J.—Ajamian v. North Bergen Tp., 103 N.J. Super. 61, 246 A.2d 521 (Law Div. 1968), aff'd, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969).

12 U.S.—State v. Getty Petroleum Corp., 89 A.D.3d 262, 933 N.Y.S.2d 114 (3d Dep't 2011).

13 Fla.—State ex rel. Furman v. Searcy, 225 So. 2d 430 (Fla. 4th DCA 1969).

14 Cal.—People v. Tufts, 97 Cal. App. 3d Supp. 37, 159 Cal. Rptr. 163 (App. Dep't Super. Ct. 1979).

Impropriety of delegation of law-making power

Cal.—Bayside Timber Co. v. Board of Supervisors, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1st Dist. 1971).

15 **Storage of vehicles and boats**

Ohio—City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 2 Ohio Op. 3d 278, 357 N.E.2d 402 (8th Dist. Cuyahoga County 1976).

Administrative order to abate pollution

U.S.—Alwin Const. Co., Inc. v. Lufkin, 360 F. Supp. 1119 (D. Conn. 1973).

16 Mass.—Town of Brookline v. Commissioner of Dept. of Environmental Quality Engineering, 387 Mass. 372, 439 N.E.2d 792 (1982).

Mich.—People v. Olsonite Corp., 80 Mich. App. 763, 265 N.W.2d 176 (1978).

17 Ill.—City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969).

Garbage collection and disposal

Fla.—Stephens v. Board of County Com'rs of Okaloosa County, 278 So. 2d 269 (Fla. 1973).

Religious exemption from immunization

U.S.—Avard v. Dupuis, 376 F. Supp. 479 (D.N.H. 1974).

Restaurant sanitation

Cal.—Solander v. Municipal Court, 45 Cal. App. 3d 664, 119 Cal. Rptr. 609 (3d Dist. 1975).

Storage of solid waste

N.M.—New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Bd., 88 N.M. 201, 1975-NMCA-083, 539 P.2d 221 (Ct. App. 1975).

18 Ill.—Rockford Drop Forge Co. v. Pollution Control Bd., 79 Ill. 2d 271, 37 Ill. Dec. 600, 402 N.E.2d 602 (1980).

19 N.M.—N.M. Petroleum Marketers Assn. v. N.M. Environmental Impr. Bd., 141 N.M. 678, 2007-NMCA-060, 160 P.3d 587 (Ct. App. 2007).

20 Freeman v. Town of Hudson, 714 F.3d 29 (1st Cir. 2013).

21 Cal.—Lee v. Lost Hills Water Dist., 78 Cal. App. 3d 630, 144 Cal. Rptr. 510 (5th Dist. 1978).

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16D C.J.S. Constitutional Law § 2072

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

a. In General

§ 2072. Due process; regulation of air pollution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4324

Without violating the guaranty against the deprivation of property without due process, laws may be enacted to prevent excessive air pollution.

Without violating the guaranty against the deprivation of property without due process, laws may be enacted to prevent excessive air pollution,[1] provided they are not oppressive, unreasonable, and arbitrary.[2] Thus, an air pollution control statute requiring that no asphalt facility be located in an area within a certain distance of specified vulnerable areas does not violate the due process rights of a company that seeks a permit to construct and operate an asphalt plant because, while the company has a protected property interest in the permit, the statute is rationally related to a legitimate state purpose, protecting the environment and public health.[3] Thus, a statute or ordinance governing visible emissions generally does not violate due process,[4] and visual opacity tests, taken for the purposes of enforcing such legislation, meet minimum due process standards and are not so arbitrary or capricious as to foreclose a finding of a violation based upon such tests alone.[5] Even odors may be proscribed consistent with due process standards, and thus, a nuisance ordinance is not impermissibly vague in violation of due process where it does not give unfettered discretion to a health official to determine what constitutes a violation but requires the opinion of a

health officer that the prohibited pollution is sufficient to be disagreeable or discomforting to a person of ordinary sensibilities or detrimental to health or well-being.[6]

Principles of due process do not require a hearing or findings to support the exercise of a town board of health's rule-making authority in promulgating a regulation prohibiting smoking in the enclosed areas of a membership associations' premises.[7] Moreover, a smoking ordinance is supported by a rational basis and therefore does not violate the substantive due process rights of bar owners where a city could have believed that secondhand smoke has negative health effects, that smoking in public places is annoying to nonsmokers who are not used to inhaling smoke, and that banning smoking in public places would encourage more smokers to quit.[8]

Footnotes

1 Tenn.—Penn-Dixie Cement Corp. v. City of Kingsport, 189 Tenn. 450, 225 S.W.2d 270 (1949).
Outdoor burning
Tex.—Houston Compressed Steel Corp. v. State, 456 S.W.2d 768 (Tex. Civ. App. Houston 1st Dist. 1970).
Clean indoor air
W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).

2 **Idling of motor engine**
N.Y.—People v. Holbrook Transp. Corp., 84 Misc. 2d 650, 378 N.Y.S.2d 939 (Dist. Ct. 1976).
State anti-idling regulation not unconstitutionally vague under Due Process Clause
U.S.—U.S. v. Paul Revere Transp., LLC, 608 F. Supp. 2d 175 (D. Mass. 2009).
Smoking ban as not violative of substantive due process
Municipal smoking ban, prohibiting a proprietor from permitting a person to smoke in a public place or place of employment, bore a rational relationship to legitimate governmental interest in protecting against health dangers posed by exposure to environmental tobacco smoke and thus did not violate substantive due process rights of bar proprietors.
Ohio—Traditions Tavern v. Columbus, 171 Ohio App. 3d 383, 2006-Ohio-6655, 870 N.E.2d 1197 (10th Dist. Franklin County 2006).
Fee requirement for diesel engines as not violative of substantive due process
An air pollution control district's regulatory scheme, in requiring owners and operators of certain diesel-powered engines to register and pay fees for engines used in agricultural operations, did not violate agricultural corporation's substantive due process rights because the scheme served legitimate governmental interest in minimizing air pollution from diesel engines.
U.S.—Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934 (9th Cir. 2011).
A.L.R. Library
Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.
Validity, construction, and application of variance provisions in state and local air pollution control laws and regulations, 66 A.L.R.4th 711.

3 Conn.—Contractor's Supply of Waterbury, LLC v. Commissioner of Environmental Protection, 283 Conn. 86, 925 A.2d 1071 (2007).

4 Utah—Lloyd A. Fry Co. v. Utah Air Conservation Committee, 545 P.2d 495 (Utah 1975).

5 Colo.—Air Pollution Variance Bd. v. Western Alfalfa Corp., 191 Colo. 455, 553 P.2d 811 (1976).

6 Ga.—Wilbros, LLC v. State, 294 Ga. 514, 755 S.E.2d 145 (2014).

7 Mass.—American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Board of Health of Athol, 446 Mass. 310, 844 N.E.2d 231 (2006).

8 U.S.—Goodpaster v. City of Indianapolis, 736 F.3d 1060 (7th Cir. 2013).

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16D C.J.S. Constitutional Law § 2073

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

a. In General

§ 2073. Due process; regulation of waste disposal

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4326

The government may adopt effective means to control refuse and waste for the protection of the health, safety, and welfare of the community without violating due process.

The government may adopt effective means to control refuse and waste for the protection of the health, safety, and welfare of the community without violating due process.[1] Thus, the due process of law guaranty is not violated by a statute prohibiting the issuance of a permit for construction or operation of a rubble landfill within close proximity to certain waterways,[2] or limiting the amount of hazardous waste that can be disposed of at any affected facility in any one-year period,[3] or a statute or ordinance which authorizes the depositing of garbage or refuse on certain grounds,[4] requires that recyclable materials be separated from nonrecyclable waste,[5] or requires the garbage in certain cities to be removed by a certain department, such as the sanitation department.[6] Due process of law is also not violated by statutes or ordinances which grant to a person or corporation, having a contract with a municipality, the exclusive right to collect and transport garbage through the streets, and prohibits others from doing so,[7] and which require all persons thus authorized to remove garbage to deliver it at a particular crematory or reduction

plant for reduction at the expense of the person delivering it.[8] Such ordinances are not void as depriving persons of property without due process of law, even though the term "garbage," as defined by such ordinances, includes all refuse from the tables of private families, restaurants, and hotels,[9] and even though it may have considerable property value.[10] An extension of the term to include condemned food is, however, so unreasonable as to render the ordinance void.[11]

Rights of landowners adjacent to proposed waste site.

Adjacent land owners, whose property may be substantially affected by the installation of a landfill site, have a due process right to notice and an opportunity to be heard before a landfill permit is issued.[12] Thus, the procedures used by a State Oil and Gas Board in adopting proposed amendments to a rule governing the disposal of radioactive waste materials from gas production does not violate the state constitutional due process rights of landowners who contest the amendments where the contestants are given full and fair notice of the petition to amend the rule, the contestants are represented vigorously by competent counsel, allowed to call witnesses, and put exhibits into evidence during a four-day public hearing on the matter.[13]

Service charges.

An ordinance imposing a charge on dwelling owners for the collection and disposal of garbage and rubbish does not ordinarily violate due process of law guaranties, whether the garbage and rubbish so removed are produced by the owner or by his or her tenant.[14] The jurisdictions vary, however, as to whether regulations or ordinances requiring a resident to pay for garbage collection does[15] or does not[16] violate such resident's due process rights.

Due process rights are generally not violated by the imposition of statutorily prescribed solid waste assessment fees, as the imposition of such a fee is rationally related to the legitimate governmental purpose of defraying the administrative costs of regional or county solid waste authorities and their solid waste programs and where such a fee is neither arbitrary nor discriminatory.[17]

Footnotes

1 **Fencing**
Colo.—Mosgrove v. Town of Federal Heights, 190 Colo. 1, 543 P.2d 715 (1975).
Hazardous waste
Ga.—Georgia Dept. of Natural Resources, Environmental Protection Div. v. Union Timber Corp., 258 Ga. 873, 375 S.E.2d 856 (1989).
Chemical waste disposal
Ill.—Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 1, 55 Ill. Dec. 499, 426 N.E.2d 824 (1981).
A.L.R. Library
Applicability of zoning regulations to waste disposal facilities of state or local governmental entities, 59 A.L.R.3d 1244.

2 Md.—Maryland Dept. of Environment v. Days Cove Reclamation Co., Inc., 200 Md. App. 256, 27 A.3d 565 (2011).

3 Ala.—Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367 (Ala. 1991), decision rev'd on other grounds, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).
A.L.R. Library
Validity, construction, and application of state hazardous waste regulations, 86 A.L.R.4th 401.
Validity of local regulation of hazardous waste, 67 A.L.R.4th 822.

4 **As not divesting owner of use of farm**

N.J.—Earruso v. Board of Health of East Hanover Tp., Morris County, 120 N.J.L. 463, 200 A. 755 (N.J. Sup. Ct. 1938).

5 Me.—Tri-State Rubbish, Inc. v. Town of New Gloucester, 634 A.2d 1284 (Me. 1993).

Unconstitutionally vague flow control provisions

Flow control provisions of county's recycling and solid waste local law, which failed to take private waste transfer station's status and existence into account, were unconstitutionally vague under the Due Process Clause; county appeared to have crafted its recycling and waste management law without considering the reality that there was a licensed, fully operating waste disposal plant within the county's borders, or how the law should impact that private facility.

U.S.—JWJ Industries, Inc. v. Oswego County, 795 F. Supp. 2d 211 (N.D. N.Y. 2011).

6 **Prohibiting removal by private persons**

Ohio—City of Canton v. Van Voorhis, 61 Ohio App. 419, 14 Ohio Op. 413, 28 Ohio L. Abs. 703, 22 N.E.2d 651 (5th Dist. Stark County 1939).

7 N.D.—Tayloe v. City of Wahpeton, 62 N.W.2d 31 (N.D. 1953).

As affecting one previously engaged in business

Ga.—Advanced Disposal Services Middle Georgia, LLC v. Deep South Sanitation, LLC, 296 Ga. 103, 765 S.E.2d 364 (2014).

8 U.S.—California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204 (1905).

Ordinance requiring solid waste collection franchisees to transport waste only to city-owned landfills as not void for vagueness under Due Process Clause

U.S.—National Solid Wastes Management Ass'n v. City of Dallas, 903 F. Supp. 2d 446 (N.D. Tex. 2012).

9 U.S.—Gardner v. People of State of Michigan, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 212 (1905).

Mich.—Pantlind v. City of Grand Rapids, 210 Mich. 18, 177 N.W. 302, 15 A.L.R. 280 (1920).

10 Ind.—City of Indianapolis v. Ryan, 212 Ind. 447, 7 N.E.2d 974, 135 A.L.R. 1300 (1937).

11 Ohio—Bauer v. Casey, 16 Ohio C.D. 598, 1904 WL 1164 (Ohio Cir. Ct. 1904), dismissed by 49 W.L.B. 299.

12 Okla.—DuLaney v. Oklahoma State Dept. of Health, 1993 OK 113, 868 P.2d 676 (Okla. 1993).

13 Miss.—Adams v. Mississippi State Oil & Gas Bd., 139 So. 3d 58 (Miss. 2014).

14 Ohio—Thompson v. Green, 28 Ohio Op. 99, 12 Ohio Supp. 1, 1943 WL 6278 (C.P. 1943).

15 Ohio—Thompson v. Green, 28 Ohio Op. 99, 12 Ohio Supp. 1, 1943 WL 6278 (C.P. 1943).

16 N.M.—City of Hobbs v. Chesport, Limited, 1966-NMSC-158, 76 N.M. 609, 417 P.2d 210 (1966).

Resident derives substantial, tangible benefits from garbage collection

N.D.—Ennis v. City of Ray, 1999 ND 104, 595 N.W.2d 305 (N.D. 1999).

A.L.R. Library

State and local regulation of private landowner's disposal of solid waste on own property, 37 A.L.R.4th 635.

17 W. Va.—Wetzel County Solid Waste Authority v. West Virginia Div. of Natural Resources, 195 W. Va. 1, 462 S.E.2d 349 (1995).

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16D C.J.S. Constitutional Law § 2074

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

a. In General

§ 2074. Due process; regulation of disease control

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4320, 4331

The State may, without violating the due process of law guaranty, provide reasonable means to control and eradicate contagious or infectious diseases.

The State may, without violating the due process of law guaranty, provide reasonable means to control and eradicate contagious or infectious diseases.[1] Reasonable quarantine regulations are not void as a denial of due process of law[2] either as to persons within the quarantined district or to those forbidden to come within it.[3] Thus, the State may require the temporary detention of persons having, or reasonably suspected of having, a communicable disease dangerous to the public health without resort to a preliminary judicial proceeding, provided the State does not deprive such person altogether of a right to a hearing or a right to challenge the legality of his or her continued detention but only deprives such person of a right to a hearing in the first instance.[4] The State may also provide for the confinement, in hospitals or other designated places, of such persons.[5]

A regulation requiring all school children to be vaccinated, and excluding from the public schools such children as have not been vaccinated, is not a denial of due process of law.[6] Such a regulation is not rendered unconstitutional because it provides for exceptions where the health of the children is such as to render a vaccination unsafe.[7] Even an outright compulsory vaccination statute, subjecting a person to fine or imprisonment for neglecting or refusing to submit to vaccination, does not violate the constitutional guaranty.[8]

Due process is not denied by a statute authorizing the medical examination or testing of a person charged with a crime, who may have a communicable disease.[9] On the other hand, in the absence of a statute or a rule of a board of health clearly and definitely authorizing it, the detention of a person who is merely suspected of having a communicable disease for the purpose of forcibly subjecting him or her to a physical examination and a blood test to ascertain whether, in fact, such person is affected with such a disease is a deprivation of such person's liberty without due process of law.[10]

Animals with contagious diseases.

Where the facts justify the suspicion, the quarantining, or, in the alternative, the destruction, of animals suspected of being infected with a contagious disease is not a violation of due process.[11]

Footnotes

1 U.S.—Lisichin v. Andrews, 26 F. Supp. 882 (S.D. N.Y. 1938).
Bovine brucellosis
Statutory program of control and eradication of bovine brucellosis, including compulsory slaughter of cattle found to be infected, does not deny cattle owner whose herd is found by animal health commission to be infected with brucellosis due process even though statutory program does not afford owner hearing on question of whether there is brucellosis present in his or her herd.
Tex.—Nunley v. Texas Animal Health Commission, 471 S.W.2d 144 (Tex. Civ. App. San Antonio 1971), writ refused n.r.e., (Jan. 26, 1972).

2 Cal.—Application of Halko, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (2d Dist. 1966).

3 U.S.—Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana, 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209 (1902).

4 Mont.—Ex parte Caselli, 62 Mont. 201, 204 P. 364 (1922).

5 Ohio—Ex parte Company, 106 Ohio St. 50, 1 Ohio L. Abs. 10, 139 N.E. 204 (1922).
Isolation and hospitalization of tubercular persons
Fla.—Moore v. Draper, 57 So. 2d 648 (Fla. 1952).

6 Ark.—Seubold v. Fort Smith Special School Dist., 218 Ark. 560, 237 S.W.2d 884 (1951).

7 Tex.—Zucht v. San Antonio School Board, 170 S.W. 840 (Tex. Civ. App. San Antonio 1914), writ refused, (Oct. 13, 1915).

8 U.S.—Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).

9 **Venereal disease**
Ill.—People ex rel. Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944).
AIDS or HIV infection
N.J.—State in Interest of J.G., 151 N.J. 565, 701 A.2d 1260 (1997).
A.L.R. Library
Validity, and propriety under circumstances, of court-ordered HIV testing, 87 A.L.R.5th 631.

10 **Venereal disease**
Iowa—Wragg v. Griffin, 185 Iowa 243, 170 N.W. 400, 2 A.L.R. 1327 (1919).

11 **Rabies**
N.Y—Preudhomme v. Stebbins, 269 A.D. 409, 55 N.Y.S.2d 397 (1st Dep't 1945).
Destruction necessary to prevent spread of disease

S.D.—South Dakota Dept. of Health v. Owen, 350 N.W.2d 48 (S.D. 1984).

As to the destruction of animals to prevent the spread of disease as an exercise of the state's police power which does not violate due process, see § 2056.

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16D C.J.S. Constitutional Law § 2075

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

b. Sewage and Water Pollution

§ 2075. Due process; regulation of sewage and water pollution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4323, 4326

A statute or ordinance forbidding the pollution of bodies of water with sewage, or otherwise, is not a violation of the guaranty of due process.

A statute or ordinance forbidding the pollution of running streams or other bodies of water with sewage[1] or otherwise[2] is valid even as against riparian proprietors.[3] Such regulation may also extend to nonpublic waters.[4] A statute prohibiting variances from prescribed water quality standards likewise does not deny due process.[5]

Methods may properly be prescribed for the treatment of sewage,[6] even though compliance with such regulations requires the making of substantial alterations in existing buildings at considerable expense,[7] and even though the requirement is applied to a person who, because of exceptional circumstances, may be able, by other means, to make satisfactory disposal of sewage on his or her premises.[8] A provision of a municipal code requiring property owners to register wastewater systems or septic tanks located in the drainage basin of a lake does not violate due process where protecting the water supply and protecting a

recreational area are legitimate interests of the government, the report from a county health department indicates that the leaking septic tanks are a source of pollution to the lake, and the provision is rationally related to the legitimate governmental interest of protecting the lake from contaminants.[9] Further, it is not unconstitutional, as arbitrary and a violation of due process, to prohibit the use of a private septic system in a certain area based upon the status of community sewage systems in such area,[10] and to have a mandatory requirement that owners of property connect their premises with a public sewage system,[11] even though the requirement may work a hardship on one or more abutting property owners whose private sewage systems may be sanitary.[12] Moreover, there is no substantive due process violation in a county health district's decision to revoke a landowners' permit to install a sewage system where a voluminous record clearly demonstrates that the district's decision is quite rationally related to its legitimate concerns with public health and safety.[13] Conversely, the failure to provide more immediate access to a public sewerage treatment facility is not a denial of due process.[14] The reasonableness of moratoria imposed on sanitary sewer hookups must be judged, for purposes of determining whether they constitute a deprivation of property without due process, both in terms of their purpose and their duration.[15] Additionally, regulations requiring a permit for new wastewater treatment or disposal systems,[16] as well as the meeting of prescribed requirements prior to its issuance,[17] and the submission of effluent data of the applicant's discharges,[18] constitute a valid exercise of the State's police power and do not deny due process.

An administrative agency order which prohibits any additional discharge without agency approval in a sanitary sewer system which is tributary to a borough sewer system is no more than an exercise of state power over its agency, the borough, to regulate sewage treatment within the borough, and such action is not restrained by the due process guaranty.[19] On the other hand, the right of the legislature, under the exercise of the police power, to regulate the contamination of waters does not obviate the necessity of recognizing the due process clauses of the state and federal constitutions.[20] Regulations respecting the disposal of sewage which unreasonably restrict the use of a property owner's land are, however, a confiscation without due process of law.[21] Furthermore, the pollution of a running stream by a municipality by the discharge of sewage deprives a lower riparian owner of property without due process of law.[22]

Remediation expenses.

Legislation that requires residential and industrial users to pay the expense of remediating combined sewer overflow problems that contribute to the pollution of a body of water does not violate the Due Process Clause.[23]

Footnotes

1 N.H.—Town of Meredith v. State Bd. of Health, 94 N.H. 123, 48 A.2d 489 (1946).

2 R.I.—Board of Purification of Waters v. Town of East Providence, 47 R.I. 431, 133 A. 812 (1926).
Coal mine discharges
Pa.—Com. v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974).
Fine properly imposed for failure to obtain stormwater discharge permit where notice and opportunity to be heard provided
U.S.—Solors v. Warta, 2009 WL 1010626 (D. Minn. 2009), aff'd, 366 Fed. Appx. 719 (8th Cir. 2010).

3 Pa.—Com. v. Emmers, 221 Pa. 298, 70 A. 762 (1908).

4 **"Water" construed**
Ill.—Central Illinois Public Service Co. v. Pollution Control Bd., 36 Ill. App. 3d 397, 344 N.E.2d 229 (5th Dist. 1976).

5 Wyo.—U. S. Steel Corp. v. Wyoming Environmental Quality Council, 575 P.2d 749 (Wyo. 1978).

6 Wash.—Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 558 P.2d 821 (Div. 1 1977).

7 N.Y.—Tenement House Department of City of New York v. Moeschen, 179 N.Y. 325, 72 N.E. 231 (1904), aff'd, 203 U.S. 583, 27 S. Ct. 781, 51 L. Ed. 328 (1906).

8 Pa.—Appeals of Palumbo, 166 Pa. Super. 557, 72 A.2d 789 (1950).

9 Ala.—Peak v. City of Tuscaloosa, 73 So. 3d 5 (Ala. Crim. App. 2011).

10 U.S.—Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F. Supp. 1369 (D. Md. 1975).

11 Ohio—DeMoise v. Dowell, 10 Ohio St. 3d 92, 461 N.E.2d 1286 (1984).

Assessment

Or.—Trueblood v. Health Division, Dept. of Human Resources, 28 Or. App. 433, 559 P.2d 931 (1977).

12 Ky.—Sanitation Dist. No. 1 of Jefferson County v. Campbell, 249 S.W.2d 767 (Ky. 1952).

13 U.S.—Crosby v. Pickaway County General Health Dist., 303 Fed. Appx. 251 (6th Cir. 2008).

14 **Delayed expansion of treatment plant**

U.S.—Wincamp Partnership v. Anne Arundel County, Md., 458 F. Supp. 1009 (D. Md. 1978).

15 U.S.—Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F. Supp. 1369 (D. Md. 1975).

Denial of permit not denial of due process

Water quality cooperative that installed septic systems was not denied due process in application of statute governing individual sewage treatment systems in permitting process for failure of opportunity to be heard, given that cooperative had been through two application procedures, hearings before the city's wastewater commission, two district court proceedings, and two appeals.

Minn.—Headwaters Rural Utility Ass'n, Inc. v. City of Corcoran City Council, 2006 WL 1751738 (Minn. Ct. App. 2006).

16 Ill.—People v. Keeven, 68 Ill. App. 3d 91, 24 Ill. Dec. 663, 385 N.E.2d 804 (5th Dist. 1979).

17 **Execution of agreement**

Fla.—State ex rel. Furman v. Searcy, 225 So. 2d 430 (Fla. 4th DCA 1969).

18 Ill.—Central Illinois Public Service Co. v. Pollution Control Bd., 36 Ill. App. 3d 397, 344 N.E.2d 229 (5th Dist. 1976).

19 Pa.—Com. Dept. of Environmental Resources v. Borough of Carlisle, 16 Pa. Commw. 341, 330 A.2d 293 (1974).

A.L.R. Library

Pollution control: validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer systems, 47 A.L.R.3d 1224.

20 Mich.—L. A. Darling Co. v. Water Resources Com'n, 341 Mich. 654, 67 N.W.2d 890 (1955).

21 Pa.—Com., Dept. of Environmental Resources v. Trautner, 19 Pa. Commw. 116, 338 A.2d 718 (1975).

22 Ill.—Johnston v. City of Galva, 316 Ill. 598, 147 N.E. 453, 38 A.L.R. 1384 (1925).

A.L.R. Library

Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 A.L.R.3d 910.

23 R.I.—Town of Lincoln v. City of Pawtucket, 745 A.2d 139 (R.I. 2000).

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16D C.J.S. Constitutional Law § 2076

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

1. Health and Environment Regulations

b. Sewage and Water Pollution

§ 2076. Due process and sewer service charges

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4323, 4326

It is not a violation of the guaranty of due process to require consumers to pay sewer service charges and to provide penalties for nonpayment.

It is not a violation of the guaranty of due process to require consumers to pay sewer service charges,[1] and to provide penalties for nonpayment, such as a fine,[2] and the disconnecting of the premises from the sewer system.[3] Regulations may even properly provide for the shutting off of water furnished by the municipality to premises failing to pay such charges[4] since water and sewer services are so interlocked that neither can be effective without the other.[5] By the same reasoning, it is valid to base rates, fees, and charges for the use of sewers on the rates charged for water supply.[6]

Service of process.

Permitting alternative service on a property owner delinquent on water and sewer charges, at a location at which the city water revenue bureau affirmed that the owner could not be found, does not violate the owner's due process rights, absent record evidence of an operable mailing address, or of the identity of the property owner's corporate officers.[7]

Footnotes

1 Mo.—City of Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347 (1952).
Tenn.—Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291 (1951).
Landlord's responsibility to pay effluent service charges and penalties
A commercial landlord's lack of direct notice that tenant was accruing $40,000 in effluent-service charges and late-fee charges from metropolitan water agency, which charges landlord was responsible for paying after tenant's payment default, did not violate due process; amount of charges was not so high as to implicate landlord's due process rights, and landlord could have provided agency with landlord's address so that duplicate bills could have been mailed to landlord.
Ohio—Fierro v. Greater Cincinnati Water Works, 2010-Ohio-4314, 2010 WL 3565412 (Ohio Ct. App. 1st Dist. Hamilton County 2010).
Enforcement by lien
Va.—Farquhar v. Board of Sup'rs of Fairfax County, 196 Va. 54, 82 S.E.2d 577 (1954).

2 Ala.—Benson v. City of Andalusia, 240 Ala. 99, 195 So. 443 (1940).

3 Va.—Farquhar v. Board of Sup'rs of Fairfax County, 196 Va. 54, 82 S.E.2d 577 (1954).

4 Tenn.—Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291 (1951).
Failure to pay garbage collection charge
Tex.—City of Breckenridge v. Cozart, 478 S.W.2d 162 (Tex. Civ. App. Eastland 1972), writ refused n.r.e., (July 26, 1972).

5 Fla.—State v. City of Miami, 157 Fla. 726, 27 So. 2d 118 (1946).

6 Mo.—City of Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347 (1952).
Tenn.—Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291 (1951).

7 Pa.—City of Philadelphia Water Revenue Bureau v. Towanda Properties, Inc., 976 A.2d 1244 (Pa. Commw. Ct. 2009).

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16D C.J.S. Constitutional Law § 2077

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

2. Building and Housing Regulations; Urban Renewal

§ 2077. Due process; regulation of housing and zoning, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4073, 4074, 4091 to 4096

Reasonable building and housing regulations enacted for the public health, morals, safety, or welfare are not in violation of the requirements of due process of law, but due process is denied by arbitrary and unreasonable regulations.

Statutes or ordinances prescribing regulations with respect to the erection, maintenance, or repair of buildings or other structures are not invalid as denying due process of law if they are reasonably adapted to promote the public health, morals, safety, or general welfare.[1] Thus, regulations relating to minimum standards for dwelling structures, the inspection of dwellings, enforcement procedures, and authorizing the vacation or condemnation of dwelling structures which are unsafe or unfit for human habitation are not violative of due process.[2] Accordingly, inasmuch as in the exercise of a state's police power regarding property use, such as in zoning and building permit requirements, the government may legitimately impose many types of restrictions or development conditions on a landowner which are not, per se, violative of substantive due process.[3] And the State may properly regulate issues such as the height of buildings;[4] the size, construction, spacing, and placement of billboards[5] and signs;[6] the minimum widths of streets and sidewalks in platting lots;[7] the minimum size of lots;[8] the maximum size of single-family residences;[9] the establishment of a building line;[10] dedication of easements for public use, setbacks from the

street, requirements for streets and access, creation of park or green spaces in residential developments, and environmental regulations.[11] A zoning ordinance permitting development in a riverfront district only if the underlying plan provides for development "appropriate in scale, density, character and use for the surrounding community" is rationally related to the goal of the integrity and consistency of appropriate development, as required by substantive due process.[12] Moreover, aesthetics do not invalidate an ordinance, and the goals of protecting real estate from impairment and destruction of value are includable under the general welfare aspect of municipal police power and justify its reasonable exercise.[13] Any such regulations which are, however, arbitrary and unreasonable, and have no substantial relation to the public health, morals, safety, or general welfare, are unconstitutional.[14]

A law forbidding owners of realty to erect any buildings on their realty violates due process[15] though a statute prohibiting beachfront property owners from rebuilding structures on their property in the event of destruction beyond repair does not constitute a taking of property without due process of law.[16] Additionally, while the preservation of the residential nature of a neighborhood is a proper subject for legislative protection,[17] it is a deprivation of property without due process of law for a municipality to prohibit the erection of business buildings in a residential section of a city except with the consent of the owners of adjacent property.[18] Similarly, the action of a municipal agency in disapproving a plan of subdivision for reasons not authorized by statute also deprives the owner of the subdivision of property of due process of law,[19] though, in light of a town's legitimate governmental interests regarding the urbanization effects of development, a town will not be deemed to act irrationally or arbitrarily in denying a landowner's planned development application, and, thus, does not violate his or her substantive due process rights, where the denial of such application is clearly rationally related to those interests.[20]

Judicial enforcement of restrictive covenant.

Judicial enforcement of a covenant restricting the use of lots in a certain area to private residences, apartments, and certain types of business, as against an owner seeking to put his or her lot to another use, does not operate as a denial of due process.[21]

CUMULATIVE SUPPLEMENT

Cases:

Property developers failed to sufficiently allege that county and county planning commission acted arbitrarily or irrationally when it amended master plan that governed zoning requirements for developers' property, and, thus, failed to state substantive due process claim; subject amendment explicitly laid out county's reasoning, including that environmental analysis showed continued uncertainty about ability to protect water resources if full development occurred under original plan recommendations, and protection of water resources was legitimate exercise of county's police power. U.S. Const. Amend. 14. Pulte Home Corporation v. Montgomery County, Maryland, 271 F. Supp. 3d 762 (D. Md. 2017).

City council's use of protest petition procedure, which included city owned land within the calculation of land area needed to gather required signatures, was not a violation of due process rights of neighbors of development project who challenged the rezoning of parcel of land from requiring single-family homes to allowing three-story apartment buildings, where city charter required the use of all city-owned land in calculating protest area. U.S. Const. Amend. 14. Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433 (Colo. App. 2017), cert. denied, 2017 WL 4652472 (Colo. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946).
Building code ordinances
Me.—LaBay v. Town of Paris, 659 A.2d 263 (Me. 1995).
Zoning ordinances
Me.—Putnam v. Town of Hampden, 495 A.2d 785 (Me. 1985).
Balancing public interest and confiscatory impact of ordinance
A zoning ordinance is a valid exercise of the police power when it promotes public health, safety, or welfare and its regulations are substantially related to the purpose the ordinance purports to serve, and in applying that formulation, courts use a substantive due process analysis that requires a reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights.
Pa.—Piper Group, Inc. v. Bedminster Tp. Bd. of Sup'rs, 992 A.2d 224 (Pa. Commw. Ct. 2010), aff'd, 612 Pa. 282, 30 A.3d 1083 (2011).
A.L.R. Library
Validity and construction of statute or ordinance requiring installation of automatic sprinklers, 63 A.L.R.5th 517.

2 Ohio—State ex rel. Schulman v. City of Cleveland, 8 Ohio Misc. 1, 37 Ohio Op. 2d 12, 220 N.E.2d 386 (C.P. 1966).

3 Wash.—Robinson v. City of Seattle, 119 Wash. 2d 34, 830 P.2d 318 (1992).

4 U.S.—Williams v. Parker, 188 U.S. 491, 23 S. Ct. 440, 47 L. Ed. 559 (1903).
Minn.—Walters v. Olmsted County, 295 Minn. 544, 204 N.W.2d 215 (1973).

5 Mich.—Billboards by Johnson, Inc. v. Township of Algoma, 2006 WL 2035591 (Mich. Ct. App. 2006).
Mo.—St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), dismissed, 231 U.S. 761, 34 S. Ct. 325, 58 L. Ed. 470 (1913).
A.L.R. Library
Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 A.L.R.3d 564.

6 Ohio—Northern Ohio Sign Contractors Ass'n v. City of Lakewood, 32 Ohio St. 3d 316, 513 N.E.2d 324 (1987).
A.L.R. Library
Challenges to Regulation of Balloon Signs or Other Inflated Signs, 49 A.L.R.6th 153.
Validity and construction of zoning regulations relating to illuminated signs, 30 A.L.R.5th 549.
Validity and construction of provision prohibiting or regulating advertising sign overhanging street or sidewalk, 80 A.L.R.3d 687.
Validity and construction of ordinance prohibiting roof signs, 76 A.L.R.3d 1162.
Validity of regulations restricting size of freestanding advertising signs, 56 A.L.R.3d 1207.

7 Fla.—Garvin v. Baker, 59 So. 2d 360 (Fla. 1952).

8 Fla.—Garvin v. Baker, 59 So. 2d 360 (Fla. 1952).
A.L.R. Library
Construction and application of zoning laws setting minimum lot size requirements, 2 A.L.R.5th 553.
Validity of zoning laws setting minimum lot size requirements, 1 A.L.R.5th 622.

9 **County area of extremely rare natural beauty**
Wyo.—Board of County Com'rs of Teton County v. Crow, 2003 WY 40, 65 P.3d 720 (Wyo. 2003).

10 Mo.—In re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S.W. 404, 28 A.L.R. 295 (1923).
Shorter setback with permit
Del.—Papaioanu v. Commissioners of Rehoboth, 25 Del. Ch. 327, 20 A.2d 447 (1941).

11 Wash.—Robinson v. City of Seattle, 119 Wash. 2d 34, 830 P.2d 318 (1992).

12 U.S.—CMR D.N. Corp. v. City of Philadelphia, 829 F. Supp. 2d 290 (E.D. Pa. 2011), aff'd, 703 F.3d 612 (3d Cir. 2013).

13 Ohio—Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984).

14 N.Y.—People v. Diamond, 71 Misc. 2d 311, 335 N.Y.S.2d 711 (N.Y. City Ct. 1972).
Minimum square footage requirements for single family home

Conn.—Builders Service Corp., Inc. v. Planning & Zoning Com'n of Town of East Hampton, 208 Conn. 267, 545 A.2d 530, 87 A.L.R.4th 255 (1988).

15 Fla.—Beck v. Littlefield, 68 So. 2d 889 (Fla. 1953).

16 U.S.—Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991).

17 Mich.—Charter Tp. of Delta v. Dinolfo, 419 Mich. 253, 351 N.W.2d 831 (1984).

18 Ill.—Klumpp v. Rhoads, 362 Ill. 412, 200 N.E. 153 (1936).

19 Conn.—Beach v. Planning and Zoning Commission of Town of Milford, 141 Conn. 79, 103 A.2d 814 (1954).

20 Tex.—Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).

21 Mo.—Matthews v. First Christian Church of St. Louis, 355 Mo. 627, 197 S.W.2d 617 (1946).

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16D C.J.S. Constitutional Law § 2078

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

2. Building and Housing Regulations; Urban Renewal

§ 2078. Due process requirements for grant or denial of building permit

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4073, 4074, 4091 to 4096

A building permit may be denied without a violation of due process where adequate grounds exist for such denial.

A building permit may be denied without a violation of due process where adequate grounds exist for such denial.[1] Moreover, to state a substantive due process claim, a permit applicant must allege that the city's denial of its permit application was not rationally related to the city's legitimate interest; a city does not violate due process merely because it acts in a manner not authorized by an ordinance.[2] An arbitrary refusal of the authorities to grant a building permit deprives a landowner of property without due process.[3] An ordinance giving an official unrestricted discretion to grant or deny building permits is likewise invalid.[4] A municipality's refusal to issue clearly nondiscretionary building permits is similarly a violation of substantive due process.[5] An ordinance which implies that a permit will be granted whenever it appears that a building will not be detrimental to public health, safety, or welfare is not, however, open to an objection on the ground that it deprives a landowner of property without due process.[6]

Demolition permit.

A demolition permit may properly be denied without a violation of due process.[7]

Adjacent owner's due process rights.

A county's approval of special use permits for the construction of windmills on a property does not constitute a "taking" of the owner's adjacent property for Fifth Amendment purposes even if the approval diminishes the owner's potential uses of her property.[8] Moreover, an adjacent property owner does not have a property interest in the lifting of zoning restrictions on the next-door property and thus is not denied due process as a result of the county's approval of special use permits for the construction of windmills on the adjacent property.[9]

CUMULATIVE SUPPLEMENT

Cases:

City's adoption of zoning regulation that prohibited self-storage facilities within 250 of property on which a school was located did not shock the conscience, as required for property owner that sought to build self-storage facility on its property adjacent to school to succeed on its substantive due process claim against city, despite owner's claim that regulation was targeted at it alone; regulation applied equally to all property and city was entitled to credit the concerns of its citizenry as to safety of students and welfare of children with regard to self-storage facility being located near school. U.S. Const. Amend. 14. Siena Corporation v. Mayor and City Council of Rockville Maryland, 873 F.3d 456 (4th Cir. 2017).

Assuming that a business was deprived of a constitutionally protected right by county's denial of business's application for a building permit, county had a rational basis to deny the application, thus precluding business's substantive due process claim against county, where business lacked the driveway access necessary to operate its proposed wastewater injection facility until business obtained a driveway access permit, and it was rational to require the same conditions to construct the facility that would be required to operate the facility. U.S.C.A. Const.Amend. 14. TexCom Gulf Disposal, L.L.C. v. Montgomery County, 623 Fed. Appx. 657 (5th Cir. 2015).

County's application of land use ordinance so as to require property owner to set aside or dedicate substantial portion of property for benefit of public for future use as right of way as precondition for development permit was executive action, rather than legislative action, and thus did not violate owner's substantive due process rights. U.S. Const. Amend. 14, § 1. Hillcrest Property, LLP v. Pasco County, 915 F.3d 1292 (11th Cir. 2019).

Town zoning board of appeals (ZBA) was authorized under town code to require operators of bed and breakfast to seek site plan review for property's accessory use as a wedding venue; town code required site plan review and approval by planning board for all principal uses, a requirement that necessarily attended to an approved accessory use, and while originally the property's use as a bed and breakfast was originally approved without conditions, town code imposed a duty on ZBA to impose "conditions and safeguards as may be required to protect the public health, safety, morals and general welfare." Brophy v. Town of Olive Zoning Board of Appeals, 166 A.D.3d 1123, 86 N.Y.S.3d 650 (3d Dep't 2018).

[END OF SUPPLEMENT]

Footnotes

1 Va.—City of Staunton v. Cash, 220 Va. 742, 263 S.E.2d 45 (1980).

Denial of building permit for liquor store as comporting with due process

A city's decision to deny a building permit to a liquor store was rationally related to a legitimate governmental interest, which comported with substantive due process where the city was responding to concerns about the impact that having a second liquor store in a shopping center would have on public health and welfare.

U.S.—Vineyard Inv., LLC v. City of Madison, Miss., 757 F. Supp. 2d 607 (S.D. Miss. 2010), aff'd, 440 Fed. Appx. 310 (5th Cir. 2011).

Refusal to issue permits pending outcome of referendum

U.S.—City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003).

2 U.S.—Maryland Manor Associates v. City of Houston, 816 F. Supp. 2d 394 (S.D. Tex. 2011).

3 U.S.—U.S. v. Wheeling Downs, 72 F. Supp. 882 (N.D. W. Va. 1947).

Denial of permit arbitrary and capricious

Allegations stated a claim for denial of substantive due process where it alleges that the city denied a permit application based on the proposed project's traffic impact even though the city previously found that the proposed project did not have any adverse traffic impact.

U.S.—Maryland Manor Associates v. City of Houston, 816 F. Supp. 2d 394 (S.D. Tex. 2011).

4 Tex.—Gulf Refining Co. v. City of Dallas, 10 S.W.2d 151 (Tex. Civ. App. Dallas 1928), writ dismissed w.o.j., (Feb. 13, 1929).

Permit after consent of property owners

Del.—Appeal of Lloyd, 39 Del. 15, 196 A. 155 (Super. Ct. 1937).

5 Cal.—Galland v. City of Clovis, 24 Cal. 4th 1003, 103 Cal. Rptr. 2d 711, 16 P.3d 130 (2001), as modified, (Mar. 21, 2001).

6 Colo.—Averch v. City and County of Denver, 78 Colo. 246, 242 P. 47 (1925).

Effect of delay in granting building permit

W. Va.—Hutchison v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996).

7 **Permit stopped by historic preservation officer**

Kan.—Allen Realty, Inc. v. City of Lawrence, 14 Kan. App. 2d 361, 790 P.2d 948 (1990) (overruled on other grounds by, Friends of Bethany Place, Inc. v. City of Topeka, 297 Kan. 1112, 307 P.3d 1255 (2013)).

Propriety of showing of special merit to support application for demolition of historic building

D.C.—Kalorama Heights Ltd. Partnership v. District of Columbia Dept. of Consumer and Regulatory Affairs, 655 A.2d 865 (D.C. 1995).

8 U.S.—Muscarello v. Ogle County Bd. of Com'rs, 610 F.3d 416 (7th Cir. 2010).

9 U.S.—Muscarello v. Ogle County Bd. of Com'rs, 610 F.3d 416 (7th Cir. 2010).

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16D C.J.S. Constitutional Law § 2079

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

2. Building and Housing Regulations; Urban Renewal

§ 2079. Due process and urban renewal

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4057, 4073, 4074, 4091 to 4096

Urban renewal serves a legitimate public purpose and a taxpayer is not deprived of property without due process simply because the taxpayer claims to receive no direct benefit from a specific project.

Urban renewal serves a legitimate public purpose and a taxpayer is not deprived of property without due process simply because the taxpayer claims to receive no direct benefit from a specific project.[1] The Takings Clause of the Fifth Amendment does not prevent a village from condemning property for private use within a redevelopment district.[2] Additionally, taking private property through eminent domain to stem blighting and deteriorating conditions is a public purpose under due process concepts.[3] Conversely, any benefits which will inure to private individuals incidental to the construction of a proposed facility pursuant to a redevelopment plan dealing with urban blight do not render the construction and operation of such a facility in violation of the due process guaranty.[4] A city's use of tax increment financing for its urban renewal plan does not violate the due process clauses of the state and federal constitutions where property owners are assessed the same property tax rate, but the Urban Renewal Law authorizes the diversion of tax increment funds to the municipality to pay for renewal projects, the city's plan is related to a public purpose and to the legitimate government objective of urban renewal.[5]

A governmental or public agency may, by condemnation, acquire private property for redevelopment or slum clearance purposes, and since property acquired for such purposes is devoted to a public use, statutes which authorize the subsequent sale of such property to private interests are not in denial of due process of law as permitting the taking of one person's property for the private use of another.[6] Economic development can qualify as "public use," for eminent domain purposes,[7] and thus, a city's exercise of its eminent domain power in furtherance of an economic development plan satisfies the constitutional "public use" requirement,[8] even where the city was not planning to open the condemned land to use by the general public, where the economic development plan served a public purpose.[9]

The government's action in demolishing property after making a determination that buildings are unsafe and a threat to the public welfare may not properly be construed as a deprivation of property without due process of law but rather as a proper exercise of the police power.[10] In this connection, acts authorizing housing authorities to undertake slum clearance and the construction of low-rent housing are not invalid as violating the Due Process Clause,[11] nor do such acts violate the Due Process Clause on the ground that the low-rent housing constructed will be in competition with the rental properties of taxpayers.[12] The inclusion of buildings which are sound within an urban renewal plan area also does not violate the constitutional guaranty.[13]

Under a demolition statute, a lienholder on an apartment building damaged by fire is entitled to notice of the village's suit for demolition of the apartment building, not simply of a request for a demolition order subsequent to a judgment on the village's complaint.[14] However, a demolition statute's requirement that lienholders be provided with notice is not an absolute mandate such that a new trial was compulsory where a lienholder was not notified, the lack of notice under the statute could be remedied, and notice to the mortgagee after the demolition order was vacated, protecting the mortgagee's due process rights.[15]

Footnotes

1 Iowa—Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413 (Iowa 1970).

2 U.S.—Didden v. Village of Port Chester, 173 Fed. Appx. 931 (2d Cir. 2006).

3 Va.—Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc., 272 Va. 2, 630 S.E.2d 505 (2006).

Effect of negotiation with redeveloper for sale before condemnation

A city redevelopment authority did not impermissibly take an owner's property for the private use of a redeveloper simply because the authority selected the redeveloper and negotiated with it a contract for the sale and redevelopment of the property as a charter school before the condemnation, as state law clearly permitted the authority to select a redeveloper and to negotiate contracts for sale and redevelopment of real property within a redevelopment area prior to submitting a redevelopment proposal for approval.

Pa.—In re Condemnation of Land for the South East Cent. Business District Redevelopment Area #1, 946 A.2d 1143 (Pa. Commw. Ct. 2008).

4 Utah—Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975).

5 N.D.—Haugland v. City of Bismarck, 2012 ND 123, 818 N.W.2d 660 (N.D. 2012).

6 Ill.—People ex rel. Gutknecht v. City of Chicago, 3 Ill. 2d 539, 121 N.E.2d 791 (1954).

R.I.—Ajootian v. Providence Redevelopment Agency of City of Providence, 80 R.I. 73, 91 A.2d 21 (1952).

7 Mo.—State ex rel. Jackson v. Dolan, 398 S.W.3d 472 (Mo. 2013).

8 U.S.—Didden v. Village of Port Chester, 173 Fed. Appx. 931 (2d Cir. 2006).

9 U.S.—Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).

As to redevelopment as a public use, see § 2079.

10 N.Y.—Rochester Poster Advertising Co. v. City of Rochester, 38 A.D.2d 679, 327 N.Y.S.2d 249 (4th Dep't 1971).

Unsanitary buildings

U.S.—Keyes v. Madsen, 179 F.2d 40 (D.C. Cir. 1949).

11 Cal.—Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal. App. 2d 777, 266 P.2d 105 (1st Dist. 1954).

Ill.—People ex rel. Gutknecht v. City of Chicago, 3 Ill. 2d 539, 121 N.E.2d 791 (1954).

12 N.D.—Ferch v. Housing Authority of Cass County, 79 N.D. 764, 59 N.W.2d 849 (1953).

13 Idaho—Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972).

14 Ill.—Village of Ringwood v. Foster, 2013 IL App (2d) 111221, 369 Ill. Dec. 349, 986 N.E.2d 662 (App. Ct. 2d Dist. 2013), as modified on denial of reh'g, (Mar. 21, 2013) and appeal denied, 374 Ill. Dec. 577, 996 N.E.2d 24 (Ill. 2013).

15 Ill.—Village of Ringwood v. Foster, 2013 IL App (2d) 111221, 369 Ill. Dec. 349, 986 N.E.2d 662 (App. Ct. 2d Dist. 2013), as modified on denial of reh'g, (Mar. 21, 2013) and appeal denied, 374 Ill. Dec. 577, 996 N.E.2d 24 (Ill. 2013).

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16D C.J.S. Constitutional Law § 2080

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

2. Building and Housing Regulations; Urban Renewal

§ 2080. Due process; regulation of landmarks

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4057, 4073, 4074, 4091 to 4096

Although a landmark regulation is invalid if it denies a property owner all reasonable return on his or her property, there is no constitutional imperative that such return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests, but, rather, it is enough for the limited purposes of a landmarking statute that the privately created ingredient of the property receive a reasonable return.

Since landmark preservation is a legitimate state interest, and where the rejection of a property owner's incompatible proposal is aimed at achieving the purpose of landmark preservation, the denial of a landmark owner's application for certificate of approval to develop historic site did not violate due process.[1] Although landmark regulation is invalid if it denies a property owner all reasonable return on his or her property, there is no constitutional imperative that such return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests.[2] It is, rather, enough for the limited purposes of a landmarking statute that the privately created ingredient of the property receive a reasonable return.[3] In most instances involving landmark issues, it is acceptable to use an alternative basis of valuation as a basis for determining the reasonableness of return.[4] If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there is no deprivation of due process.[5] The compensation for a

landowner forced to relinquish development rights on a landmark site need not, however, be the just compensation required in eminent domain.[6] Thus, such a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment.[7] Accordingly, a plaintiff seeking to show that an otherwise reasonable land use regulation constitutes a deprivation of due process of law must, even as to the privately created ingredient of the property's value, demonstrate affirmatively that the regulation eliminates all reasonable return.[8]

Vagueness issues in landmark ordinances.

Allegations in a landowners' complaint are sufficient to state a cause of action that a city's landmarks ordinance is unconstitutionally vague and ambiguous in violation of their state due process rights where the terms used in the criteria outlined in the ordinance to assist the landmarks commission in recommending buildings or districts for landmark status, such as "value," "important," "significant," and "unique," are vague, ambiguous, and overly broad, and the appellate court is uncertain as to what the ordinance means when it provides that members of the landmarks commission must be selected from professionals in specified disciplines.[9] A town's historic preservation ordinance is not facially unconstitutional in violation of due process under the void for vagueness doctrine on the ground that it allows the town council to make arbitrary decisions with respect to similarly situated property owners when it involuntarily designates a structure as a local historic landmark, where the ordinance provides property owners with fair notice that their property could be designated as a historic landmark if one or more of the criteria are satisfied.[10]

CUMULATIVE SUPPLEMENT

Cases:

Historic preservation citations issued to property owner, for its historic preservation violations of replacing windows without a historic preservation commission certificate of approval, were sufficient and did not violate its due process; commission was not required to specifically indicate which of the property's 186 windows violated the ordinance, nor indicate that exact date of replacement, as owner had sufficient information to identify which windows were replaced without a certificate, and a historic preservation violation continued each and every day the violation continued. U.S. Const. Amend. 14; Md. Code Ann., Land Use §§ 8-101 et seq., 11-203. Spaw, LLC v. City of Annapolis, 452 Md. 314, 156 A.3d 906 (2017).

When city's landmarks preservation commission (LPC) was considering whether to issue certificate of appropriateness authorizing work on designated interior landmark, i.e., a building's nineteenth century nonelectrified mechanical clocktower, which building's owner wanted to convert into private residence, with electrification of the clock, commission had authority, under city's administrative code and under recitation of landmark designation in deed to building owner, to require public access to an interior landmark, and to require that the clock's historic mechanism continue to operate. New York City Administrative Code, §§ 25–302(l, m), 25–304(b), 25–307(a, e). Save America's Clocks, Inc. v. City of New York, 66 N.Y.S.3d 252 (App. Div. 1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 Wash.—Conner v. City of Seattle, 153 Wash. App. 673, 223 P.3d 1201 (Div. 1 2009).

2 N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

A.L.R. Library

Validity and construction of statute or ordinance protecting historical landmarks, 18 A.L.R.4th 990.

3 N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

4 **Assessed valuation**

N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

5 N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

6 N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

As to just compensation under eminent domain as required by due process, generally, see § 2064.

7 N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

8 **Integration with surrounding property**

N.Y.—Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), judgment aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

9 Ill.—Hanna v. City of Chicago, 388 Ill. App. 3d 909, 329 Ill. Dec. 799, 907 N.E.2d 390 (1st Dist. 2009).

10 Colo.—Kruse v. Town of Castle Rock, 192 P.3d 591 (Colo. App. 2008).

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16D C.J.S. Constitutional Law § 2081

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

3. Proceedings; Penalties; Review

§ 2081. Procedural due process requirements and health and environmental regulations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4320 to 4332

The requirements of procedural due process generally apply to proceedings involving health and environmental regulations.

The requirements of procedural due process generally apply to proceedings involving health and environmental regulations.[1] In determining whether there has been a violation of a health or environmental protection regulation, due process requires that every affected party receive notice and an opportunity to be heard.[2] Notice which is not reasonable,[3] or does not meet the requirement of being of such a nature as reasonably to convey the required information regarding the right of a hearing,[4] or which is inadequate to apprise concerned landowners of governmental actions affecting their property interests,[5] violates due process. Due process generally requires personal notice of an owner's right to a hearing before the government may properly deprive him or her of any property interest because of alleged health violations notwithstanding the notice provided by the public character of a health ordinance.[6] While, ordinarily, due process requires an opportunity for some kind of hearing prior to deprivation of a significant property interest,[7] the absence of a hearing prior to the passage of environmental or health legislation is not a

deprivation of due process.[8] Additionally, since the protection of health and safety of the public is a paramount governmental interest, a summary administrative action may be justified in emergency situations.[9]

Due process under environmental protection statutes does not necessarily imply court proceedings.[10] Thus, so long as the hearing is orderly, follows established rules which do not violate fundamental rights, and affects all persons alike, due process is accomplished.[11] Legislative-type hearings conducted by an environmental protection agency are not, therefore, necessarily inconsistent with due process.[12]

Due process does not require that an alleged polluter be advised when it is under investigation or informed immediately after a violation has been discovered[13] or that a notice of a violation issued by a designated agency be subject to preenforcement review.[14] To establish a violation of environmental regulations by an inspector's observations, due process contemplates that notice be given to an alleged polluter within a reasonably short period of time following completion of the inspection.[15] Prior or contemporary notice of the inspection is not, however, required.[16] In determining whether a defendant is deprived of due process under an environmental protection statute by allowing evidence of observations of emissions from the defendant's plant, although such observations are made without notice, it is necessary to weigh the governmental function involved against the private interest affected by that function.[17] Where all the real evidence of a pollution violation, by its nature, exists only temporarily, and where that evidence can be preserved only through the subjective observations of an employee of the agency, the fundamental fairness requirement of due process dictates that the alleged violator, whether individual or corporate, must, in an administrative proceeding, be given notice of the fact that evidence is being gathered and be afforded a reasonable opportunity to be present or otherwise be provided with an adequate opportunity to gather similar probative evidence.[18]

Environmental impact statements.

There are no due process strictures on the mode, nature, or type of notice that must be given before the adoption or filing of an environmental impact report or negative declaration to the effect that a project will have no significant adverse impact or effect on the environment.[19]

Sewer connection charge.

The levying of a substantial sewer connection charge without notice and a public hearing does not constitute a taking of property without due process, since any property owner aggrieved by the charge possesses his or her privilege to apply to a court.[20]

Footnotes

1 U.S.—Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).
Due process rights of third parties
A nonapplicant in the siting process for a landfill has a right to only the minimal standards of procedural due process, such as the right to be heard, the right to cross-examine adverse witnesses, and the right to have impartial rulings on the evidence.
Ill.—County of Kankakee v. Illinois Pollution Control Bd., 396 Ill. App. 3d 1000, 352 Ill. Dec. 825, 955 N.E.2d 1 (3d Dist. 2009), as corrected, (Jan. 26, 2010).

2 Colo.—Western Alfalfa Corp. v. Air Pollution Variance Bd., 35 Colo. App. 207, 534 P.2d 796 (App. 1975), judgment aff'd, 191 Colo. 455, 553 P.2d 811 (1976).

Administrative procedures in adopting amendments to rule governing disposal of waste materials as not violative of due process where landowners had notice and an opportunity to be heard a public hearing

Miss.—Adams v. Mississippi State Oil & Gas Bd., 139 So. 3d 58 (Miss. 2014).

Filing rules and regulations

Cal.—People v. A-1 Roofing Service, Inc., 87 Cal. App. 3d Supp. 1, 151 Cal. Rptr. 522 (App. Dep't Super. Ct. 1978).

3 Md.—Uhler v. Secretary of Health and Mental Hygiene, 45 Md. App. 282, 412 A.2d 1287 (1980).

4 U.S.—Wilson v. Health and Hospital Corp. of Marion County, 620 F.2d 1201 (7th Cir. 1980).

5 Cal.—Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979).

6 **Provisions in notice**

Reproduction of hearing provisions of applicable health ordinance in notice to property owner of alleged health violations meets due process notice requirements.

U.S.—Wilson v. Health and Hospital Corp. of Marion County, 620 F.2d 1201 (7th Cir. 1980).

7 U.S.—Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

8 U.S.—Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Com'n, 598 F.2d 759 (3d Cir. 1979); E & E Hauling, Inc. v. Forest Preserve Dist. of Du Page County, Ill., 613 F.2d 675 (7th Cir. 1980).

Implementation of federal standards

U.S.—Indiana & Michigan Elec. Co. v. E.P.A., 509 F.2d 839 (7th Cir. 1975).

Control of land use

Cal.—CEEED v. California Coastal Zone Conservation Com., 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (4th Dist. 1974).

9 U.S.—Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

Cessation of surface mining

W. Va.—Anderson & Anderson Contractors, Inc. v. Latimer, 162 W. Va. 803, 257 S.E.2d 878 (1979).

10 Ill.—Meadowlark Farms, Inc. v. Illinois Pollution Control Bd., 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974).

11 Ill.—Meadowlark Farms, Inc. v. Illinois Pollution Control Bd., 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974).

12 U.S.—Cleveland Elec. Illuminating Co. v. E.P.A., 572 F.2d 1150 (6th Cir. 1978); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973).

Agency methodology

U.S.—International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

13 Ill.—Freeman Coal Mining Co. v. Illinois Pollution Control Bd., 29 Ill. App. 3d 441, 330 N.E.2d 524 (5th Dist. 1975).

14 U.S.—Lloyd A. Fry Roofing Co. v. U.S. E.P.A., 415 F. Supp. 799 (W.D. Mo. 1976), judgment aff'd, 554 F.2d 885 (8th Cir. 1977).

15 Wash.—Chemithon Corp. v. Puget Sound Air Pollution Control Agency, 19 Wash. App. 689, 577 P.2d 606 (Div. 1 1978).

16 Colo.—Air Pollution Variance Bd. v. Western Alfalfa Corp., 191 Colo. 455, 553 P.2d 811 (1976).

17 **No notice**

Tex.—Lloyd A. Fry Roofing Co. v. State, 524 S.W.2d 313 (Tex. Civ. App. Dallas 1975), writ refused n.r.e., (Oct. 29, 1975).

18 **Preclusion from rebutting evidence**

Colo.—Western Alfalfa Corp. v. Air Pollution Variance Bd., 35 Colo. App. 207, 534 P.2d 796 (App. 1975), judgment aff'd, 191 Colo. 455, 553 P.2d 811 (1976).

19 Cal.—Lee v. Lost Hills Water Dist., 78 Cal. App. 3d 630, 144 Cal. Rptr. 510 (5th Dist. 1978).

20 Conn.—Rocky Hill Convalescent Hospital, Inc. v. Metropolitan Dist., 160 Conn. 446, 280 A.2d 344 (1971).

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16D C.J.S. Constitutional Law § 2082

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

3. Proceedings; Penalties; Review

§ 2082. Procedural due process requirements and building and urban renewal regulations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4073, 4074, 4096

In order for the government to legally enforce its building and urban renewal regulations, it is mandatory that it comply with recognized procedural due process, affording notice and an opportunity to be heard.

An urban renewal law does not violate due process for failure to provide procedural guidelines for a hearing on the issue of blight in an urban renewal proceeding.[1] Additionally, since a proceeding to amend building code provisions is legislative or political, an adjudicatory hearing is not essential to due process.[2] Moreover, a city's determination of blight under an urban renewal statute is legislative rather than judicial, and thus, due process entitles the landowner only to publication notice, rather than personal notice, of the meetings to make blight determinations.[3] To ascribe finality to the determination of public officials that a building is unfit for human habitation and constitutes a public nuisance, without a hearing on the issue, is, however, a denial of due process of law,[4] though, the mere posting of property as unsafe, pursuant to emergency provisions of a state building code, does not require that the building owner be given prior notice, hearing, and an opportunity to respond to claimed violations in advance of such posting.[5] A landowner becomes entitled to and is afforded the full range of due process protections in

condemnation proceedings, including the rights of personal notice, the opportunity to be heard, and to cross-examine witnesses, when landowners' property becomes subject to forfeiture.[6]

In order for the government to legally demolish a building pursuant to a statute or ordinance delineating the procedure to be followed in demolishing buildings,[7] or even apart from such statute or ordinance,[8] it is mandatory that the government comply with recognized procedural due process, affording adequate notice,[9] an opportunity to be heard,[10] and the opportunity to correct or repair the defect before demolition.[11] Accordingly, in the absence of exigent circumstances, the government must adhere closely to the demands of rudimentary due process before it can effectuate the destruction of a person's property without compensation on the basis of safeguarding the health and safety of the community.[12]

Where a city acts pursuant to a valid summary-demolition ordinance when it demolishes a building without prior notice to the property owner, the city's decision to demolish the building on an emergency basis is entitled to deference and does not violate the owner's right to procedural due process unless it is arbitrary or an abuse of discretion.[13]

An ordinance prohibiting rebuilding, within certain limits, of a frame building, unless certain materials are used, does not deprive a person of property without due process, in that it contains no provision for notice and a hearing, where it provides for appeal and notice before abatement.[14] Additionally, a building inspector's order refusing a permit to repair a frame building does not deny due process although no notice or hearing is given before the order is made.[15]

Trailer permits.

A denial of an application for a trailer permit affects a property right of the applicant so that due process requires that notice and an opportunity to be heard be given before a decision is rendered.[16]

CUMULATIVE SUPPLEMENT

Cases:

Property owner had protected due process property interest in right under Colorado's urban renewal statute to seek review within 30 days of city's adverse blight determination, regardless of whether blight determination adversely affected properties' value, where statute limited city council's discretion by providing 11 exclusive factors for its decision, and provided property owners right to judicial review for abuse of discretion. U.S. Const. Amend. 14; Colo. Rev. Stat. Ann. § 31-25-105.5(2)(b). M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 (10th Cir. 2018).

Due process did not require that city provide property owner with specific notice of 30-day time frame in which to seek review of city's blight determination under Colorado's urban renewal statute; once city notified it of blight finding, it was up to owner to find out what remedies were available under state law. U.S. Const. Amend. 14; Colo. Rev. Stat. Ann. § 31-25-105.5(2)(b). M.A.K. Investment Group, LLC v. City of Glendale, 889 F.3d 1173 (10th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Wash.—Apostle v. City of Seattle, 77 Wash. 2d 59, 459 P.2d 792 (1969).

No public hearing necessary to consider certification of area for redevelopment

Pa.—Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh, 527 Pa. 550, 594 A.2d 1375 (1991).

2 Mass.—Cast Iron Soil Pipe Institute v. Board of State Examiners of Plumbers and Gas Fitters, 8 Mass. App. Ct. 575, 396 N.E.2d 457 (1979).

3 Okla.—City of Midwest City v. House of Realty, Inc., 2008 OK 28, 198 P.3d 886 (Okla. 2008).

4 N.J.—Ajamian v. North Bergen Tp., 103 N.J. Super. 61, 246 A.2d 521 (Law Div. 1968), aff'd, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969).

5 Conn.—Gorra Realty, Inc. v. Jetmore, 200 Conn. 151, 510 A.2d 440 (1986).

6 Okla.—City of Midwest City v. House of Realty, Inc., 2008 OK 28, 198 P.3d 886 (Okla. 2008).

7 **Building in historic district**

Md.—Mayor and Aldermen of City of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974).

8 Mich.—Geftos v. City of Lincoln Park, 39 Mich. App. 644, 198 N.W.2d 169 (1972).

9 Cal.—City of Santa Monica v. Gonzalez, 43 Cal. 4th 905, 76 Cal. Rptr. 3d 483, 182 P.3d 1027 (2008).

Formal notification of deficiencies

Iowa—Hancock v. City Council of City of Davenport, 392 N.W.2d 472 (Iowa 1986).

10 Ala.—Reaves v. City of Tuscumbia, 483 So. 2d 396 (Ala. 1986).

Cal.—D & M Financial Corp. v. City of Long Beach, 136 Cal. App. 4th 165, 38 Cal. Rptr. 3d 562 (2d Dist. 2006).

11 Cal.—City of Santa Monica v. Gonzalez, 43 Cal. 4th 905, 76 Cal. Rptr. 3d 483, 182 P.3d 1027 (2008).

12 U.S.—Miles v. District of Columbia, 354 F. Supp. 577 (D.D.C. 1973), judgment aff'd, 510 F.2d 188 (D.C. Cir. 1975).

13 U.S.—RBIII, L.P. v. City of San Antonio, 713 F.3d 840 (5th Cir. 2013).

14 Iowa—City of Shenandoah v. Replogle, 198 Iowa 423, 199 N.W. 418 (1924).

15 Minn.—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 191 Minn. 60, 253 N.W. 8 (1934).

16 N.Y.—Calhoun v. Town Bd. of Town of Saugerties, 94 Misc. 2d 78, 404 N.Y.S.2d 61 (Sup 1978), adhered to on reargument, 94 Misc. 2d 78, 406 N.Y.S.2d 661 (Sup 1978).

Full hearing not required

N.Y.—Calhoun v. Town Bd., Town of Saugerties Dept. of Safety and Buildings, 94 Misc. 2d 78, 406 N.Y.S.2d 661 (Sup 1978).

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16D C.J.S. Constitutional Law § 2083

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Constitutional Law
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§ 2083. Procedural due process requirements and penalties

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3887, 4073, 4074, 4096, 4320

No penalty may properly be assessed for violations of building or health and environmental regulations unless the accused is given notice of such violation and an opportunity to be heard.

A defendant may not be fined with civil penalties for violation of a local zoning ordinance or condition of a building permit unless he or she is afforded due process, including a reasonable written notice that the defendant is, in fact, in violation of the town ordinance.[1] Allowing a statutory fine for such a violation to accrue on a daily basis pending a hearing on the matter does not, however, violate a land owners' due process rights, where the owner is afforded an adequate opportunity to challenge the fine before payment is required to begin.[2]

Health legislation is not unconstitutional on the ground that its civil penalty scheme has a chilling effect on the exercise of due process rights by threatening a greater penalty if exercised.[3] Environmental protection regulations providing for civil or criminal penalties, or both, for the same act,[4] do not deny due process, though a particular statute may provide that no penalty be assessed unless the accused is given notice and an opportunity to be heard.[5] Further, the imposition of a civil monetary penalty, on a

strict liability basis, does not, in certain instances, violate due process of law.[6] The assessment of a civil penalty for violations of environmental regulations does not deprive a defendant of due process by the fact that the same agency official signs the charging documents as issues the final administrative decisions.[7] On the other hand, where a government environmental quality board has an institutional interest in imposing hefty fines because the collected monies are deposited into an board's special account over which the board has limitless discretion, the appearance of bias supports a due process claim in penalty proceedings.[8]

CUMULATIVE SUPPLEMENT

Cases:

Trial court did not abuse its discretion or violate due process rights of gasoline-service facility owner by sustaining objection to one question owner posed to expert of members-only retail store regarding store's permit application for planned expansion of its existing store and addition of adjacent gasoline station, despite contention that court improperly prevented owner from presenting evidence; owner cross-examined expert specifically about underground stormwater pipe and outlet, and when asked whether store's permit application had considered any improvements to be installed around proposed outlet, court sustained objection based on expert's earlier testimony that she had no knowledge of any planned structure or improvements. U.S.C.A. Const.Amend. 14. In re Costco Stormwater Discharge Permit, 2016 VT 86, 151 A.3d 320 (Vt. 2016).

[END OF SUPPLEMENT]

Footnotes

1 N.H.—Town of Nottingham v. Newman, 147 N.H. 131, 785 A.2d 891 (2001).

2 N.H.—Town of Nottingham v. Newman, 147 N.H. 131, 785 A.2d 891 (2001).

3 Cal.—Lackner v. Perkins, 91 Cal. App. 3d 433, 154 Cal. Rptr. 138 (4th Dist. 1979).

Due process requirements as commensurate with the severity of the penalty

Ohio—Deer Park Inn v. Ohio Dept. of Health, 185 Ohio App. 3d 524, 2009-Ohio-6836, 924 N.E.2d 898 (10th Dist. Franklin County 2009).

Penalty against pharmaceutical company for violating state unfair trade practices act, in providing misleading information regarding risks and side effects of drug, as not violative of due process

S.C.—State ex. rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 2015 WL 775094 (S.C. 2015).

4 Wash.—Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33 (1975).

Imposition of fine within statutorily permissible range

Mass.—Com. v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 526 N.E.2d 768 (1988).

Penalty statute not void for vagueness

A statute is not void for vagueness in violation of due process, even though the state's department of the environment was not required under the statute to assign a particular dollar amount for violation in imposing a penalty where the statute provided for eight enumerated factors to apply in considering appropriate penalty, and the department had discretion to protect workers and the public from radiation exposure.

Md.—Neutron Products, Inc. v. Department Of The Environment, 166 Md. App. 549, 890 A.2d 858 (2006).

5 U.S.—U.S. v. Slade, Inc., 447 F. Supp. 638 (E.D. Tex. 1978).

6 **Discharge of oil or hazardous substances into or upon navigable waters**

U.S.—U.S. v. Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981).

7 Md.—American Recovery Co., Inc. v. Department of Health and Mental Hygiene, 306 Md. 12, 506 A.2d 1171 (1986).

8 U.S.—Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136 (1st Cir. 2008).

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16D C.J.S. Constitutional Law § 2084

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

C. Health and Environment; Building Regulations

3. Proceedings; Penalties; Review

§ 2084. Procedural due process requirements and review of regulatory decisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3887, 4073, 4074, 4096, 4320

Decisions of the government with regard to health, environmental, and building regulations may, in a proper instance, be reviewed to determine whether they comport with due process requirements.

Where the findings or conclusions and official decision of an administrative agency regarding land use does not comply fully with the requirements of an applicable statute or with administrative due process, the record is inadequate and a court cannot properly make a full judicial review of such decision.[1] A time limit for filing a petition for review of an administrator's action comports with due process.[2] In some instances, a complainant's correspondence with a governmental agency in which the complainant communicates the merit of its position, together with a statutory right to a judicial review of an agency's decision, satisfies procedural due process requirements of notice and an opportunity to be heard.[3]

The test for a substantive due process claim in the context of a land use regulation is whether there has been a deprivation of a constitutionally protected interest, and whether the deprivation, if any, is the result of an abuse of government power sufficient to raise an ordinary tort to the stature of a constitutional violation.[4] In reviewing whether a regulation affecting real property violates due process, the court must determine whether the regulation is aimed at achieving a legitimate public purpose, whether

it uses means that are reasonably necessary to achieve that purpose, and whether it is unduly oppressive on a landowner.[5] In analyzing the unduly oppressive element of a substantive due process test in a land regulation action, the court must balance the public's interest against that of the regulated landowner.[6] On the public side, the court must consider the seriousness of the public problem, the extent to which an owner's land contributes to it, the degree to which a proposed regulation solves it, and the feasibility of less oppressive solutions.[7] On the landowner's side, the court must consider the amount and percentage of value loss; the extent of the remaining uses; the past, present and future uses; the temporary or permanent nature of the regulation; the extent to which the landowner should have anticipated such regulation; and how feasible it is for the landowner to alter his or her present or currently planned uses.[8] The purpose of the unduly oppressive prong of a substantive due process test in land regulation actions is to prevent excessive police power regulations that require a landowner to shoulder an economic burden, which, in justice and fairness, the public should rightfully bear.[9]

Footnotes

1 Del.—Application of International Acceptance Co., 280 A.2d 733 (Del. Super. Ct. 1971).

2 U.S.—Lloyd A. Fry Roofing Co. v. U.S. Environmental Protection Agency, 554 F.2d 885 (8th Cir. 1977).

3 Wis.—Waste Management of Wisconsin, Inc. v. State Dept. of Natural Resources, 128 Wis. 2d 59, 381 N.W.2d 318 (1986).

4 Iowa—Blumenthal Inv. Trusts v. City of West Des Moines, 636 N.W.2d 255 (Iowa 2001).

Substantive due process not denied inasmuch as zoning decision that in effect destroyed view from home would not limit homeowners' use and enjoyment of property

U.S.—Kriss v. Fayette County, 827 F. Supp. 2d 477 (W.D. Pa. 2011), judgment aff'd, 504 Fed. Appx. 182 (3d Cir. 2012).

Governmental action wholly without legal justification

N.Y.—Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617, 781 N.Y.S.2d 240, 814 N.E.2d 410 (2004).

5 Wash.—Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993).

Factors considered

Wash.—Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wash. 2d 740, 49 P.3d 867 (2002).

6 Wash.—Peste v. Mason County, 133 Wash. App. 456, 136 P.3d 140 (Div. 2 2006).

7 Wash.—Peste v. Mason County, 133 Wash. App. 456, 136 P.3d 140 (Div. 2 2006).

8 Wash.—Peste v. Mason County, 133 Wash. App. 456, 136 P.3d 140 (Div. 2 2006).

9 Wash.—Christianson v. Snohomish Health Dist., 133 Wash. 2d 647, 946 P.2d 768 (1997).

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16D C.J.S. Constitutional Law VIII XXII D Refs.

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Civil Rights and Discrimination
A.L.R. Index, Constitutional Law
A.L.R. Index, Due Process
A.L.R. Index, Employment
West's A.L.R. Digest, Civil Rights 1237 to 1240
West's A.L.R. Digest, Constitutional Law 1917, 1921, 3861, 3898, 3900, 4155 to 4188
West's A.L.R. Digest, Labor and Employment 997 to 1091, 1109, 1110, 1236, 1340 to 1505

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16D C.J.S. Constitutional Law § 2085

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2085. Due process considerations in regulation of employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4177 to 4182

The rights and privileges arising from employer-employee relationships, including the right to enter into contracts of employment, are within the protection of constitutional guaranties of due process of law although subject to reasonable regulation in the interest of the public welfare.

The rights and privileges arising from employer-employee relationships are within the protection of constitutional guaranties of due process of law.[1] Included within this protection, as a part of the liberty of the individual as well as a property right, is the right of the employer and of the employee to enter into contracts of employment[2] as well as the freedom to accept or refuse employment.[3]

The rights and privileges protected are not absolute but are subject to reasonable limitations imposed in the exercise of the police power for the purpose of promoting the public health, safety, and general welfare,[4] including reasonable regulations as to hours of employment.[5] The fact that both parties are of full age and competent to contract does not necessarily deprive the

legislature of its power to interfere where they do not stand on terms of equality or where public health demands that one party to the contract be protected against such party's own actions.[6] However, an act that constitutes a mere arbitrary restriction on the liberty to contract, and which is not reasonably necessary for the protection of the public health or welfare, is void.[7]

Where no state or federal action on the part of either employer or employee is alleged or present, the prohibitions of the Fifth and Fourteenth Amendments with respect to due process do not apply.[8]

In dealing with the relation of employer and employee the legislature necessarily has broad discretion,[9] although it cannot arbitrarily delegate its power of regulation to private persons,[10] and legislation regulating employment must not be so vague that persons of common intelligence must necessarily guess at its meaning.[11]

Investigation of applicants.

The Due Process Clause does not limit an employer's power to investigate the capabilities and competence of employment applicants.[12] Statutes authorizing measures and regulations for the screening of employees that are necessary to prevent jeopardizing the national security in certain industries, such as the shipping industry, are not in violation of due process of law,[13] and review of matters related to security clearance is limited to question of due process.[14] Due process is not violated by a law prohibiting the administration to minors of polygraph examinations in an employment context.[15]

Footnotes

1 S.C.—Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).

2 U.S.—Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1280 (1923).
Ga.—State v. McMillan, 253 Ga. 154, 319 S.E.2d 1 (1984).
Me.—Director of Bureau of Labor Standards v. Fort Halifax Packing Co., 510 A.2d 1054 (Me. 1986), judgment aff'd, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987).
Miss.—Coast Materials Co. v. Harrison County Development Com'n, 730 So. 2d 1128 (Miss. 1998).
S.C.—Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866, 60 Ed. Law Rep. 1004 (1990).
As to liberty to contract, see § 1892.
As to employment as personal, civil, or political right, see § 823.
As to regulation of employment of labor as within the constitutional guaranty of equal protection of the laws, see §§ 1444 to 1448.

3 U.S.—Gordon v. Schiro, 310 F. Supp. 884 (E.D. La. 1970).

4 U.S.—West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).
Minn.—State v. International Harvester Co., 241 Minn. 367, 63 N.W.2d 547 (1954).
N.J.—Chamber of Commerce of U. S. v. State, 89 N.J. 131, 445 A.2d 353 (1982).
Wash.—Ostroff v. Laundry & Dye Works Drivers' Local No. 566, 37 Wash. 2d 595, 225 P.2d 419 (1950).
Reasonable regulation
Although liberty component of Fourteenth Amendment's Due Process Clause includes some generalized right to choose one's field of private employment, this right is subject to reasonable government regulation.
U.S.—Conn v. Gabbert, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999).
Nonsmoking rule
A fire department's nonsmoking rule, which prohibited firefighter trainees from smoking on- or off-duty for one year, had a rational relationship to a legitimate state purpose in promoting health and safety and, therefore, did not violate the Due Process Clause or asserted liberty and privacy interests where the

firefighters were frequently exposed to smoke inhalation and where one might reasonably conclude that smoking increases the health risk from smoke inhalation.

U.S.—Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987).

As to the police power as affected by the guaranty of due process, generally, see § 1868.

5 U.S.—Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952).

Cal.—California Drive-In Restaurant Ass'n v. Clark, 22 Cal. 2d 287, 140 P.2d 657, 147 A.L.R. 1028 (1943).

N.Y.—Emerson v. Mary Lincoln Candies, 173 Misc. 531, 17 N.Y.S.2d 851 (Sup 1940), judgment aff'd, 261 A.D. 879, 26 N.Y.S.2d 489 (4th Dep't 1941), judgment aff'd, 287 N.Y. 577, 38 N.E.2d 234 (1941).

6 U.S.—West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).

7 U.S.—Owen v. Westwood Lumber Co., 22 F.2d 992 (D. Or. 1927).

Ariz.—Atchison, T. & S. F. Ry. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563 (1928).

S.C.—Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).

No violation of contract clause

A municipal ordinance providing employees of certain hospitality businesses the protective benefit of temporary employment in the event of a change in employer does not violate the Contract Clause of the Constitution where the ordinance does not affect the terms of existing collective bargaining agreements, nor does it impose terms of employment on a successor employer unless the new employer's conduct qualifies it as a "clear successor." Whether the retention provision of the ordinance is likely to result in additional bargaining obligations to new business hospitality employers depended on whether the new employer continued to retain its predecessor's employees.

U.S.—Rhode Island Hospitality Ass'n v. City of Providence ex rel. Lombardi, 775 F. Supp. 2d 416 (D.R.I. 2011), aff'd, 667 F.3d 17 (1st Cir. 2011).

8 U.S.—Florey v. Air Line Pilots Ass'n, Intern., 575 F.2d 673 (8th Cir. 1978).

Haw.—International Broth. of Painters and Allied Trades, Drywall Tapers, Finishers & Allied Workers Local Union 1944, AFL CIO v. Befitel, 104 Haw. 275, 88 P.3d 647 (2004).

9 U.S.—West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).

Cal.—California Drive-In Restaurant Ass'n v. Clark, 22 Cal. 2d 287, 140 P.2d 657, 147 A.L.R. 1028 (1943).

10 U.S.—Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

11 U.S.—Rimmer v. Colt Industries Operating Corp., 656 F.2d 323 (8th Cir. 1981).

Ill.—Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc., 118 Ill. 2d 389, 113 Ill. Dec. 915, 515 N.E.2d 1222, 43 Ed. Law Rep. 287, 64 A.L.R.4th 603 (1987).

Mich.—Michigan State AFL-CIO v. Employment Relations Com'n, 453 Mich. 362, 551 N.W.2d 165, 111 Ed. Law Rep. 490 (1996).

Mo.—Hanch v. K. F. C. Nat. Management Corp., 615 S.W.2d 28, 24 A.L.R.4th 1100 (Mo. 1981).

12 U.S.—Brown v. Bi-State Development Agency, 449 F. Supp. 46 (E.D. Mo. 1978).

13 U.S.—U.S. v. Gray, 207 F.2d 237 (9th Cir. 1953).

14 U.S.—Stoyanov v. Department of Navy, 348 Fed. Appx. 558 (Fed. Cir. 2009).

15 U.S.—Amato v. Suffolk County, 668 F. Supp. 151 (E.D. N.Y. 1987), judgment aff'd, 847 F.2d 834 (2d Cir. 1988).

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16D C.J.S. Constitutional Law § 2086

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2086. Due process considerations regarding employment discrimination

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4172, 4174, 4175, 4178, 4187, 4188,

Dismissal from employment based on illegal discrimination may violate a due process interest.

Dismissal from employment based on illegal discrimination may violate a due process interest.[1] A public employment contract may confer a property interest in continued employment protected by the Due Process Clause.[2] Any state or federal law requiring applicants for any job to be turned away because of their color is invalid under the Due Process Clause.[3] The right to file an employment discrimination claim may be considered a property right under state law for purposes of due process.[4]

Rudimentary principles of due process and fair play must be complied with in order to reach an employer's ongoing acts of discrimination.[5] In an employment discrimination action, for instance, due process requires that interested parties receive adequate notice.[6]

When a party complaining of racial discrimination in employment relies on a violation of the constitutional guaranty of due process in the Fifth or Fourteenth Amendment, an invidious racially discriminatory purpose must be found.[7] Where a state constitution does not contain an explicit equal protection clause, equal protection under the law is generally considered to be guaranteed under the state's Due Process Clause.[8]

When only the investigative nonadjudicatory powers of an equal employment opportunity commission are utilized, due process considerations do not attach.[9] Due process does not require judicial review of a reasonable cause determination of such a commission in an employment discrimination case,[10] and due process is not denied because determination of the discrimination action is decided in the first instance by an administrative agency rather than a court.[11]

Footnotes

1 Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).
As to employment discrimination legislation, see C.J.S., Civil Rights §§ 214 to 301.

2 Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).

3 U.S.—Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963).
Diverse treatment for class members
Legislative act that arbitrarily establishes diverse treatment for members of natural class results in invidious discrimination and violates Equal Protection and Due Process Clauses of federal and state constitution where diverse treatment or classification bears no reasonable relationship to purpose of act.
W. Va.—Lepon v. Tiano, 181 W. Va. 185, 381 S.E.2d 384 (1989).

4 Ill.—Jabbari v. Illinois Human Rights Com'n, 173 Ill. App. 3d 227, 123 Ill. Dec. 17, 527 N.E.2d 480 (1st Dist. 1988).

5 N.Y.—Pan American World Airways, Inc. v. New York State Human Rights Appeal Bd., 61 N.Y.2d 542, 475 N.Y.S.2d 256, 463 N.E.2d 597 (1984).
W. Va.—McJunkin Corp. v. West Virginia Human Rights Com'n, 179 W. Va. 417, 369 S.E.2d 720 (1988).
Wis.—Watkins v. Department of Industry, Labor & Human Relations, 69 Wis. 2d 782, 233 N.W.2d 360 (1975).

6 U.S.—Equal Employment Opportunity Commission v. Airguide Corp., 539 F.2d 1038 (5th Cir. 1976).

7 D.C.—Newsweek Magazine v. District of Columbia Commission on Human Rights, 376 A.2d 777 (D.C. 1977).
Notice by publication
In employment discrimination class action on behalf of airline reservationists, customer service agents, and cargo sales agents and applicants for those positions, fact that unsuccessful black applicants were notified only by publication, while employees received notice by mail and publication, did not deprive applicants of due process.
U.S.—Quigley v. Braniff Airways, Inc., 85 F.R.D. 74, 28 Fed. R. Serv. 2d 1116 (N.D. Tex. 1979).

8 Colo.—Mayo v. National Farmers Union Property and Cas. Co., 833 P.2d 54 (Colo. 1992).
Md.—State Administrative Bd. of Election Laws v. Board of Sup'rs of Elections of Baltimore City, 342 Md. 586, 679 A.2d 96 (1996).
Okla.—Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City, 1995 OK 62, 901 P.2d 800 (Okla. 1995).
W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).

9 U.S.—Shell Oil Co. v. U.S. E.E.O.C., 523 F. Supp. 79 (E.D. Mo. 1981).
Ill.—Jabbari v. Illinois Human Rights Com'n, 173 Ill. App. 3d 227, 123 Ill. Dec. 17, 527 N.E.2d 480 (1st Dist. 1988).
S.C.—Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804 (1982).

10 U.S.—Georator Corp. v. Equal Employment Opportunity Commission, 592 F.2d 765 (4th Cir. 1979).

11 Mo.—Percy Kent Bag Co. v. Missouri Com'n on Human Rights, 632 S.W.2d 480 (Mo. 1982).

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16D C.J.S. Constitutional Law § 2087

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2087. Due process considerations regarding employment discrimination —Affirmative action to promote equal employment opportunities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Civil Rights 1237 to 1240
West's Key Number Digest, Constitutional Law 3861, 3898 to 3900

The use of affirmative action for the purpose of promoting the equal employment opportunities of minorities and women does not violate due process.

Federal civil rights laws do not require preferential treatment for minorities, but they also do not prohibit all race-conscious affirmative action, where there is a conspicuous imbalance in traditionally segregated job categories and an affirmative action plan is moderate and flexible.[1] The use of affirmative action for the purpose of promoting the equal employment opportunities of minorities and women does not violate due process.[2] An affirmative action plan must incorporate necessary elements of due process in providing fair procedures for an employer to make a showing that insufficient qualified minority workers are available.[3]

Footnotes

1 U.S.—Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

2 U.S.—Liberty Mut. Ins. Co. v. Friedman, 485 F. Supp. 695 (D. Md. 1979), judgment rev'd on other grounds, 639 F.2d 164 (4th Cir. 1981).

3 U.S.—Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973).
As to affirmative action in employment, generally, see C.J.S., Civil Rights §§ 244, 673; §§ 1283, 1286; C.J.S., Labor Relations § 829.

16D C.J.S. Constitutional Law § 2088

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D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2088. Due process considerations in occupational safety, health, and welfare standards

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4180 to 4182

An employer has no due process interest affected by the promulgation of safety and health standards. Statutes passed in the interest of occupational safety, health, and welfare and containing reasonable regulations as to the conditions of employment do not violate due process.

An employer has no due process interest affected by the promulgation of safety and health standards,[1] and statutes passed in the interest of occupational safety, health, and welfare and containing reasonable regulations as to the conditions of employment have been upheld against challenges that they violate due process.[2] Generally, due process of law applies to the proceedings of administrative agencies for the enforcement of occupational safety and health statutes and regulations.[3]

Due process mandates that an employer receive notice of the requirements of any occupational safety and health regulation before being cited for an alleged violation[4] although in some situations due process requires only a prompt, rather than a prior, hearing.[5] To be valid, the regulation must prescribe a standard so definite, fixed, and understandable as to permit compliance

with it[6] and so that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited.[7] Regulations satisfy due process as long as a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require.[8]

If an administrative agency promulgates an open-ended safety standard, it is required by due process to prove the reasonableness of its application in each case to assure that the parties subject to its terms have been fairly warned.[9] On the other hand, it has been held that all that due process requires is a fair and reasonable warning and that the Federal Constitution does not demand that the employer be actually aware that the regulation is applicable to the employer's conduct or that a hazardous condition exists.[10] Penalties can be imposed and allowed to become final for alleged occupational safety violations consistently with due process where an opportunity for a hearing is provided.[11]

The Due Process Clause does not assure safe working conditions for public employees.[12]

CUMULATIVE SUPPLEMENT

Cases:

Risk of harm in pointing the muzzle of a gun at another person and pulling the trigger, while skipping any kind of safety check, was obvious, and thus supported inference that police firearms safety instructor had actual knowledge of risk of serious harm, as required to be liable for violation of state trooper's substantive due process rights under state-created danger doctrine in § 1983 action brought by estate of trooper who died after instructor fatally shot him during a firearms safety training session. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Kedra v. Schroeter, 876 F.3d 424 (3d Cir. 2017).

Federal Mine Safety and Health Review Commission (FMSHRC) abused its discretion in denying aluminum-refinery operator's motion to reopen Mine Safety and Health Administration's (MSHA) final citation and penalty assessment order for operator's failure to test for mercury, which operator failed to timely contest, and instead mistakenly paid assessment, after employee responsible for dealing with MSHA unexpectedly quit; FMSHRC denied motion to reopen on ground that operator had inadequate internal processing system, but it failed to explain why it did not follow its precedent in factually similar cases in which it had granted motions to reopen despite inadequate internal processing systems of operators in those cases. Federal Mine Safety and Health Act of 1977 § 105, 30 U.S.C.A. § 815(a); 30 C.F.R. §§ 47.21, 56.5002, 100.3, 100.6. Noranda Alumina, L.L.C. v. Perez, 841 F.3d 661 (5th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979).

2 U.S.—Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980) (Occupational Safety and Health Act).

3 U.S.—General Motors Corp. v. Director of Nat. Institute of Occupational Safety and Health (NIOSH), 459 F. Supp. 235 (S.D. Ohio 1978); Lucas v. Morton, 358 F. Supp. 900 (W.D. Pa. 1973).
Ariz.—Highway Products Co. v. Occupational Safety and Health Review Bd., 133 Ariz. 54, 648 P.2d 1060 (Ct. App. Div. 1 1982).
Ky.—Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130 (Ky. 2000).
Failure to permit rebuttal

Failure to permit employer to rebut Occupational Safety and Health Review Commission's evidence of economic feasibility of proposed engineering noise controls constituted denial of due process.
U.S.—Carnation Co. v. Secretary of Labor, 641 F.2d 801 (9th Cir. 1981).
As to due process as applicable to administrative proceedings for the adjustment of labor disputes and the regulation of labor relations, see § 2104.
As to the Occupational Safety and Health Act, generally, see C.J.S., Labor Relations §§ 17 to 42.

4 U.S.—Savina Home Industries, Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979).
Effect of industry custom
Absent clear articulation by Occupational Safety and Health Review Commission of circumstances in which industry practices were not controlling, due process required, in order to establish violations of OSHA regulation governing provision of personal protective equipment to employees in construction industry, showing that employers either failed to provide personal protective equipment customarily required in industry or had actual knowledge that personal protective equipment was required under circumstances of cases.
U.S.—S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Com'n, 659 F.2d 1273 (5th Cir. 1981).

5 U.S.—Mohawk Excavating, Inc. v. Occupational Safety and Health Review Com'n, 549 F.2d 859 (2d Cir. 1977); Clarkson Const. Co. v. Occupational Safety and Health Review Com'n, 531 F.2d 451 (10th Cir. 1976).

6 U.S.—Ray Evers Welding Co. v. Occupational Safety and Health Review Commission, 625 F.2d 726 (6th Cir. 1980).
Program for classifying dangerous chemicals
In a rule requiring employers across industries to develop a program for classifying the dangers of workplace chemicals and convey those dangers to their employees, the absence of clear criteria for evaluating a party's chosen alternative methods for addressing combustible dust is not fatal on a facial due process vagueness challenge. Previous experience, laboratory testing, and published test results would adequately allow employers to classify combustible dust hazards and employers could use the more protective of the two standards if they wished.
U.S.—National Oilseed Processors Ass'n v. Occupational Safety & Health Admin., 769 F.3d 1173 (D.C. Cir. 2014).
Concentrations of vinyl chloride
Safety standard requiring that no worker be exposed to concentrations of vinyl chloride in excess of one part per million averaged over any eight-hour period was not so vague and uncertain in its terms that enforcement would violate requirements of due process.
U.S—Society of Plastics Industry, Inc. v. Occupational Safety and Health Admin., 509 F.2d 1301 (2d Cir. 1975).
Machine guarding
Occupational Safety and Health Administration regulation under which Secretary of Labor cited an employer for failing to provide machine guarding at an undercutter's point of operation was not so vague as to violate the employer's Fifth and Fourteenth Amendment rights.
U.S.—PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981).

7 U.S.—Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148 (2d Cir. 1999).

8 U.S.—Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148 (2d Cir. 1999).

9 U.S.—Modern Drop Forge Co. v. Secretary of Labor, 683 F.2d 1105 (7th Cir. 1982); Greyhound Lines-West v. Marshall, 575 F.2d 759 (9th Cir. 1978).

10 U.S.—Faultless Div., Bliss & Laughlin Industries, Inc. v. Secretary of Labor, 674 F.2d 1177 (7th Cir. 1982).

11 Ariz.—Highway Products Co. v. Occupational Safety and Health Review Bd., 133 Ariz. 54, 648 P.2d 1060 (Ct. App. Div. 1 1982).

12 **Sanitation workers**
U.S.—Collins v. City of Harker Heights, Tex., 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).
Prison guards
U.S.—Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986).

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16D C.J.S. Constitutional Law § 2089

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D. Occupation and Employment

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a. Employment Issues Implicating Due Process Concerns

§ 2089. Due process considerations in occupational safety, health, and welfare standards—Safety of public employee as due process right

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4166(2)

A plaintiff must allege that a public employer intended to harm an employee in order support a substantive due process claim.

The Due Process Clause generally has not been construed to impose an independent duty on municipalities to provide a minimum level of safety and security to its employees.[1] In general, a plaintiff must allege that a public employer intended to harm an employee in order support a substantive due process claim that the employer's conduct was arbitrary and shocked the conscience even if the employer was deliberately indifferent to the employee's safety.[2]

CUMULATIVE SUPPLEMENT

Cases:

Allegations that police firearms safety instructor was expressly advised of the lethal risk in handling an operational firearm through the safety rules that he acknowledged in writing gave rise to strong inference of instructor's knowledge of risk of harm in pointing the muzzle of a gun at another person and pulling the trigger, while skipping any kind of safety check, as required for safety instructor to be liable for violation of state trooper's substantive due process rights under state-created danger doctrine, in § 1983 action brought by estate of trooper who died after safety instructor fatally shot him during firearms safety training session. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Kedra v. Schroeter, 876 F.3d 424 (3d Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Fields v. Abbott, 652 F.3d 886 (8th Cir. 2011); Konah v. District of Columbia, 815 F. Supp. 2d 61 (D.D.C. 2011).

2 U.S.—Dubrow v. City of Philadelphia, 350 Fed. Appx. 784 (3d Cir. 2009); Slaughter v. Mayor and City Council of Baltimore, 682 F.3d 317 (4th Cir. 2012).

Intentional harassment shocking the conscience

The intentional harassment of a plaintiff correctional officer by fellow officers and supervisors after the plaintiff reported misconduct by a fellow officer, if it occurred, sufficed to shock the conscience for purposes of establishing a due process violation for failure to protect the correctional officer from the private behavior; such alleged actions created a risk of an inaccurate count of inmates, created risks of safety to inmates, and left the plaintiff in fear of physical danger.

U.S.—Kowaleski v. Lewis, 643 F. Supp. 2d 259 (N.D. N.Y. 2009).

16D C.J.S. Constitutional Law § 2090

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D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2090. Due process considerations regarding employment discharge, layoff, and demotion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4155 to 4162, 4177 to 4182, 4188

The constitutional guaranty of due process of law does not protect against the discharge or demotion of an employee unless the requisite state action is present, and the termination adversely affects protected property or liberty interests.

The constitutional guaranty of due process of law does not protect against the discharge or demotion of an employee[1] unless the requisite state action is present,[2] and the termination adversely affects protected property or liberty interests.[3] However, a private employment contract with a "just cause" termination clause can also create a property interest protected by the Due Process Clause.[4]

An employment contract with no specified term of duration is an at-will relationship which the employer may terminate at any time, and thus, no property interest in that employment exists.[5] To bring a claim for violation of procedural due process based on discharge from a job, a claimant must prove a constitutionally protected property right in continued employment.[6] When an employee serves at will, the employee has no reasonable expectation of continued employment, and thus, no property right

protected by due process.[7] The terms of employment must provide that termination will only be "for cause" or otherwise evince mutually explicit understandings of continued employment to create a protectable property interest in continued employment under the Due Process Clause.[8] An employee must point to a state law, an ordinance, a contract, or some other understanding limiting the employer's ability to discharge the employee.[9] A property interest in employment is created and defined by the terms of the employee's appointment.[10]

For a former employee who has been charged with wrongdoing to demonstrate harm to a due process liberty interest, the employee must have suffered a stigma or other disability that forecloses the ability to take other employment, or the employee's good name, reputation, honor, or integrity must have been impugned in such a way that it might seriously damage the employee's standing and associations in the community.[11]

When cause is required before an employment relationship may be altered to the detriment of the employee, due process protections attach. Thus, the concept of property includes a legitimate claim of entitlement to continued employment at a particular rank, absent sufficient cause for demotion.[12] A unilateral expectation of continued employment does not create an interest that the Due Process Clause protects.[13]

Where an employee is entitled to due process in a career decision, the employee has a right to a hearing of some kind.[14] An employee bears the responsibility for actually requesting a due process hearing on termination of employment.[15] Where an employee is fired in violation of due process rights, the availability of posttermination grievance procedures does not ordinarily cure the violation; the pretermination hearing needs to be extensive enough to guard against mistaken decisions, and accordingly, the employee is entitled to notice, an explanation of the employer's evidence, and an opportunity to present the employee's side of the story.[16]

CUMULATIVE SUPPLEMENT

Cases:

Pre-termination procedures, to comply with due process, need not be elaborate, and acceptable pre-termination procedure will consist of oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to present the employee's own side of the story. U.S.C.A. Const.Amend. 14. Hallsmith v. City of Montpelier, 2015 VT 83, 125 A.3d 882 (Vt. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Scoble v. Detroit Coil Co., 611 F.2d 661 (6th Cir. 1980).

2 N.Y.—Smallwood v. Warren, 50 A.D.2d 598, 375 N.Y.S.2d 154 (2d Dep't 1975).
No state action
Ariz.—Dimond v. Samaritan Health Service, 27 Ariz. App. 682, 558 P.2d 710 (Div. 1 1976).
N.J.—Williams v. Trans World Airlines, 149 N.J. Super. 585, 374 A.2d 486 (Ch. Div. 1977).

3 U.S.—Gilbreath v. East Arkansas Planning and Development Dist., Inc., 471 F. Supp. 912 (E.D. Ark. 1979); Jones v. District VIII Planning Council, 492 F. Supp. 143 (D. Minn. 1980).
As to property interests in public employment, see §§ 2113 to 2118.
As to liberty interests in public employment, see §§ 2119 to 2121.

4 U.S.—Wilson v. MVM, Inc., 475 F.3d 166 (3d Cir. 2007).

5 U.S.—Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000) (citing Utah law).

Ala.—Ex parte Moulton, 116 So. 3d 1119, 295 Ed. Law Rep. 401 (Ala. 2013).

6 U.S.—Wilson v. MVM, Inc., 475 F.3d 166 (3d Cir. 2007).

7 U.S.—Strolberg v. U.S. Marshals Service, 350 Fed. Appx. 113 (9th Cir. 2009).

8 U.S.—Cromwell v. City of Momence, 713 F.3d 361 (7th Cir. 2013) (applying Illinois law).

9 U.S.—Redd v. Nolan, 663 F.3d 287 (7th Cir. 2011) (applying Illinois law).

10 U.S.—Cole v. Milwaukee Area Technical College Dist., 634 F.3d 901, 265 Ed. Law Rep. 883 (7th Cir. 2011).

11 U.S.—Vega v. Miller, 273 F.3d 460, 159 Ed. Law Rep. 500 (2d Cir. 2001); Sciolino v. City of Newport News, Va., 480 F.3d 642 (4th Cir. 2007); White v. Thomas, 660 F.2d 680 (5th Cir. 1981).

Wis.—Department of Health and Social Services v. State Personnel Bd., 84 Wis. 2d 675, 267 N.W.2d 644 (1978).

No basis for claim

Private communication of reasons for employee's discharge cannot properly form basis for claim that employee's interest in his good name, reputation, honor, or integrity was thereby impaired.

U.S.—Sherman v. City of Richmond, 543 F. Supp. 447 (E.D. Va. 1982).

Remedy

Constitution requires only that person with liberty interest in his position be given chance to clear his name after employer puts person's name, reputation, honor, or integrity at stake, not reinstatement or back pay, which are intrinsically inappropriate.

U.S.—Fiorentino v. U. S., 221 Ct. Cl. 545, 607 F.2d 963 (1979).

Significant bearing on reputation

U.S.—Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977).

12 Ind.—State ex rel. Warzyniak v. Grenchik, 177 Ind. App. 393, 379 N.E.2d 997 (1978).

13 U.S.—Simpkins v. Sandwich Community Hosp., 854 F.2d 215 (7th Cir. 1988).

14 U.S.—Schwartz v. Thompson, 497 F.2d 430 (2d Cir. 1974).

Test

In determining validity of summary suspension from employment, test is strict one: predischarge hearing is constitutionally dispensable only if employer's interest is important and significantly outweighs possible injury to employee's interests.

Alaska—McMillan v. Anchorage Community Hosp., 646 P.2d 857 (Alaska 1982).

15 Ala.—Ex parte Moulton, 116 So. 3d 1119, 295 Ed. Law Rep. 401 (Ala. 2013).

16 Idaho—Cantwell v. City of Boise, 146 Idaho 127, 191 P.3d 205 (2008).

Wyo.—Town of Evansville Police Dept. v. Porter, 2011 WY 86, 256 P.3d 476 (Wyo. 2011).

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16D C.J.S. Constitutional Law § 2091

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D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2091. Due process considerations regarding wages

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4170

The right to contract as to wages to be received or paid is protected by the guaranties of due process but is subject to reasonable regulation in the interest of public welfare.

The right of employers and employees to contract with respect to wages and salaries to be received or paid is both a liberty[1] and a property[2] right protected by constitutional guaranties of due process of law. The right thus protected is not absolute in the individual, however, but is subject to reasonable regulation in the interest of the public welfare[3] and to the exercise by Congress of its power over interstate commerce.[4]

Legislation fixing or authorizing a minimum wage[5] with a prescribed increase for overtime pay[6] is not in violation of due process of law. Such legislation is not objectionable because it excludes certain classes of employees from its application[7] or is restricted in its application to less than the entire field.[8]

Various other statutes have been held not to violate due process of law guaranties, including statutes regulating the assignment of wages or salaries,[9] prescribing procedures for claims for back wages,[10] or prohibiting counting tips as a part of the minimum wage required to be paid.[11]

The Due Process Clause precludes the prescribing of minimum wages without specific legislative authority.[12] The procedure followed by an administrative board or commission in determining a minimum wage under standards fixed by statute must meet the requirements of due process of law.[13]

CUMULATIVE SUPPLEMENT

Cases:

Minimum Wage Amendment (MWA) to state constitution, which offered employer a choice of paying lower minimum wage if it offered qualifying health care benefits or higher wage if it chose not to offer them, was not void for vagueness under the due process clause; term "health benefits" was not vague as it was defined in text of the MWA itself, "health insurance" was defined in applicable portions of administrative code, and there was nothing in the record to indicate that those who enforce the MWA would act in any discriminatory manner. U.S. Const. Amend. 14; Nev. Const. art. 15, § 16; Nev. Admin. Code § 608.102(1). Western Cab Company v. Eighth Judicial District Court of State in and for County of Clark, 390 P.3d 662, 133 Nev. Adv. Op. No. 10 (Nev. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Morehead v. People of State of New York ex rel. Tipaldo, 298 U.S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, 103 A.L.R. 1445 (1936) (overruled in part other grounds by, Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941)).
Cal.—In re Moffett, 19 Cal. App. 2d 7, 64 P.2d 1190 (4th Dist. 1937).
Del.—Morford v. Bellanca Aircraft Corp., 45 Del. 129, 67 A.2d 542 (Super. Ct. 1949).
N.C.—Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).
Tex.—Mitchell v. Texas Housing Co., 265 S.W.2d 157 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.
As to the liberty to contract, generally, see § 1892.

2 Cal.—In re Moffett, 19 Cal. App. 2d 7, 64 P.2d 1190 (4th Dist. 1937).
Del.—Morford v. Bellanca Aircraft Corp., 45 Del. 129, 67 A.2d 542 (Super. Ct. 1949).
N.C.—Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).
Tex.—Mitchell v. Texas Housing Co., 265 S.W.2d 157 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.

3 U.S.—West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).
Cal.—Industrial Welfare Com. v. Superior Court, 27 Cal. 3d 690, 166 Cal. Rptr. 331, 613 P.2d 579 (1980).
Del.—Morford v. Bellanca Aircraft Corp., 45 Del. 129, 67 A.2d 542 (Super. Ct. 1949).
N.C.—Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).
Tex.—Mitchell v. Texas Housing Co., 265 S.W.2d 157 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.
Severance pay statute
Me.—Director of Bureau of Labor Standards v. Fort Halifax Packing Co., 510 A.2d 1054 (Me. 1986), judgment aff'd, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987).
Prevailing wage statute
U.S.—Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001).
Jury pay statute
Ala.—Juneman Elec., Inc. v. Cross, 414 So. 2d 108 (Ala. Civ. App. 1982).

As to the police power as it is affected by the guaranty of due process, see § 1868.

4 U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941).

As to statutes authorizing collective bargaining as affected by due process guaranties, see § 2095.

5 U.S.—Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949); Perez v. Lorraine Enterprises, Inc., 769 F.3d 23 (1st Cir. 2014); Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77 (2d Cir. 2015).

Cal.—Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343 (1944).

N.Y.—N.H. Lyons & Co. v. Corsi, 203 Misc. 160, 116 N.Y.S.2d 520 (Sup 1952), aff'd, 286 A.D. 1065, 146 N.Y.S.2d 663 (1st Dep't 1955), judgment aff'd, 3 N.Y.2d 60, 163 N.Y.S.2d 677, 143 N.E.2d 392 (1957).

Okla.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 1939 OK 155, 185 Okla. 177, 90 P.2d 899 (1939).

6 U.S.—U.S. v. Darby, 312 U.S. 100, 312 U.S. 657, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430 (1941).

7 U.S.—Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531 (1946).

8 U.S.—Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946).

9 U.S.—Western v. Hodgson, 359 F. Supp. 194 (S.D. W. Va. 1973), judgment aff'd, 494 F.2d 379 (4th Cir. 1974).

Fla.—Giles v. Family Finance Service, 155 Fla. 506, 20 So. 2d 805 (1945).

N.C.—Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

As to the validity, as a constitutional exercise of the police power, of statutes prohibiting the assignment of unearned wages and salaries, see C.J.S., Assignments § 30.

10 Kan.—Elkins v. Showcase, Inc., 237 Kan. 720, 704 P.2d 977 (1985).

11 Cal.—California Drive-In Restaurant Ass'n v. Clark, 22 Cal. 2d 287, 140 P.2d 657, 147 A.L.R. 1028 (1943).

12 Fla.—Department of Business Regulation v. Vandervoort, 273 So. 2d 66 (Fla. 1972).

13 U.S.—Washington Terminal Co. v. Boswell, 124 F.2d 235 (App. D.C. 1941), judgment aff'd, 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943).

Cal.—People v. Johnson, 42 Cal. App. 2d Supp. 827, 109 P.2d 770 (App. Dep't Super. Ct. 1941).

Del.—Morford v. Bellanca Aircraft Corp., 45 Del. 129, 67 A.2d 542 (Super. Ct. 1949).

Ill.—Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306, 39 A.L.R.2d 728 (1953).

Ohio—Strain v. Southerton, 148 Ohio St. 153, 35 Ohio Op. 167, 74 N.E.2d 69 (1947).

Utah—McGrew v. Industrial Commission, 96 Utah 203, 85 P.2d 608 (1938).

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16D C.J.S. Constitutional Law § 2092

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2092. Due process considerations regarding employment pensions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4170, 4181

The deprivation of pension or disability benefits required by state law amounts to the deprivation of constitutionally protected property. A statute providing for lawful deductions from salary or wages, such as for pensions, does not constitute a denial of substantive or procedural due process.

The deprivation of pension or disability benefits required by state law amounts to the deprivation of constitutionally protected property.[1]

A statute providing for lawful deductions from salary or wages does not constitute a denial of substantive or procedural due process.[2] For instance, a deduction for pensions is permissible,[3] but a statute requiring an employer to contribute large sums of money to the payment of pensions and annuities based on services long since completed and fully paid for constitutes a taking of property without due process of law.[4] An act that arbitrarily and unreasonably restrains and violates an employer's right to contract freely with employees as to annuities or pensions violates the Due Process Clause of the Fourteenth Amendment.[5]

Statutes establishing minimum standards assuring the equitable character of private pension plans and their financial soundness do not violate due process,[6] and retroactively imposing withdrawal liability on employers withdrawing from such plans[7] do not violate due process. While it has been held that affording a presumption of correctness to the withdrawal liability set by pension plan trustees on an employer's withdrawal from a multiemployer pension plan meets the requirements of procedural due process,[8] it has also been held that such a presumption of correctness deprives the withdrawing employers of an impartial tribunal in violation of the Due Process Clause.[9] Imposition of withdrawal liability on an employer which withdraws from a multiemployer pension plan does not violate the employer's substantive due process rights where the liability is rationally related to the employer's participation in the plan.[10]

Retroactive benefits.

The retroactive effect of a statute that reinstates benefits for survivors of particular laborers does not violate procedural due process, where Congress made its intentions clear and drew rational classifications, and the reinstatement did not violate any other constitutional guaranty. Spreading of costs of disabilities that had been bred in the past to operators and consumers who had profited from fruits of their labor is a rational measure, and the selection of a start date for retroactive benefits was found not to be arbitrary.[11]

Footnotes

1 U.S.—Katzman v. Los Angeles County Metropolitan Transportation Authority, 2014 WL 5698207 (N.D. Cal. 2014).

2 N.Y.—Lawson v. Board of Ed. of Vestal Central School Dist., 62 Misc. 2d 281, 307 N.Y.S.2d 333 (Sup 1970), aff'd, 35 A.D.2d 878, 315 N.Y.S.2d 877 (3d Dep't 1970).

3 Mont.—Trumper v. School Dist. No. 55 of Musselshell County, 55 Mont. 90, 173 P. 946 (1918).
N.J.—Allen v. Board of Ed. of City of Passaic, 81 N.J.L. 135, 79 A. 101 (N.J. Sup. Ct. 1911), aff'd, 84 N.J.L. 402, 86 A. 1102 (N.J. Ct. Err. & App. 1913).
Wis.—State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N.W. 499 (1923).

4 U.S.—Standard Oil Co. of Louisiana v. Porterie, 12 F. Supp. 100 (E.D. La. 1935).

5 U.S.—Standard Oil Co. of Louisiana v. Porterie, 12 F. Supp. 100 (E.D. La. 1935).

6 U.S.—Pension Ben. Guaranty Corp. v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1979), judgment aff'd, 630 F.2d 4 (1st Cir. 1980) (rejected other grounds by, Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124, 39 Fed. R. Serv. 2d 898 (1st Cir. 1984)).

7 U.S.—Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

8 U.S.—Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc., 762 F.2d 1137, 18 Fed. R. Evid. Serv. 391, 78 A.L.R. Fed. 639 (1st Cir. 1985); Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc., 725 F.2d 843 (2d Cir. 1984), opinion after appeal, 607 F. Supp. 570 (S.D. N.Y. 1985); Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc., 749 F.2d 1396 (9th Cir. 1984).
As to withdrawal liability of employer to multiemployer plan, generally, see C.J.S., Pensions and Retirement Plans and Benefits §§ 180 to 190.

9 U.S.—United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & Mc Donnell, Inc., 787 F.2d 128 (3d Cir. 1986), judgment aff'd, 481 U.S. 735, 107 S. Ct. 2171, 95 L. Ed. 2d 692 (1987); Robbins v. Pepsi-Cola Metropolitan Bottling Co., 636 F. Supp. 641 (N.D. Ill. 1986).

10 U.S.—Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) (under Multiemployer Pension Plan Amendment Act).

11 U.S.—Vision Processing, LLC v. Groves, 705 F.3d 551 (6th Cir. 2013).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2093. Due process considerations regarding employment on public works

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3861, 3898, 3900, 4155 to 4162, 4177 to 4182, 4187, 4188

Governmental regulations of employment terms at public works projects have been upheld as not being violative of due process.

Public works regulations pertaining to hours of labor,[1] terms or periods of employment,[2] and wage rates[3] have been upheld as not being violative of constitutional due process guaranties although a contractor or subcontractor who allegedly fails to comply with such a regulation must be afforded procedural due process before being penalized for the failure.[4]

Affirmative action measures by the United States[5] or by a state[6] mandating participation of minorities in business enterprises[7] or work forces[8] engaged in public works have also withstood challenges based on constitutional due process guaranties.

Footnotes

1 Ariz.—State v. Jay J. Garfield Bldg. Co., 39 Ariz. 45, 3 P.2d 983 (1931).
Wyo.—State v. A.H. Read Co., 33 Wyo. 387, 240 P. 208 (1925).
District of Columbia
U.S.—Ellis v. U.S., 206 U.S. 246, 27 S. Ct. 600, 51 L. Ed. 1047 (1907).
Municipal corporations
Minn.—City of St. Paul v. Fielding & Shepley, 155 Minn. 471, 194 N.W. 18 (1923).
Wash.—In re Broad, 36 Wash. 449, 78 P. 1004 (1904).
State or municipal employment
S.C.—Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).
Firefighters
Ark.—Nalley v. Throckmorton, 212 Ark. 525, 206 S.W.2d 455 (1947).

2 Tenn.—City of Nashville v. Martin, 156 Tenn. 443, 3 S.W.2d 164 (1928).

3 Ariz.—State v. Jay J. Garfield Bldg. Co., 39 Ariz. 45, 3 P.2d 983 (1931).
N.Y.—Campbell v. City of N.Y., 244 N.Y. 317, 155 N.E. 628, 50 A.L.R. 1473 (1927).
Wash.—Malette v. City of Spokane, 77 Wash. 205, 137 P. 496 (1913).
Prevailing wage
U.S.—Abhe & Svoboda, Inc. v. Chao, 508 F.3d 1052 (D.C. Cir. 2007).
Cal.—Lusardi Construction Co. v. Aubry, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837, 824 P.2d 643 (1992).
Ill.—People ex rel. Bernardi v. Roofing Systems, Inc., 101 Ill. 2d 424, 78 Ill. Dec. 945, 463 N.E.2d 123 (1984).
Ky.—TECO Mechanical Contractor, Inc. v. Com., 366 S.W.3d 386 (Ky. 2012), as corrected, (June 27, 2012).
Nev.—Universal Elec., Inc. v. State ex rel. Office of Labor Com'r, 109 Nev. 127, 847 P.2d 1372 (1993).

4 N.J.—Department of Labor v. Titan Const. Co., 102 N.J. 1, 504 A.2d 7 (1985).

5 U.S.—Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

6 U.S.—Associated General Contractors of Massachusetts, Inc. v. Altshuler, 361 F. Supp. 1293 (D. Mass. 1973), judgment aff'd, 490 F.2d 9 (1st Cir. 1973).
Federal legislation implemented
U.S.—Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), judgment aff'd, 471 F.2d 680 (7th Cir. 1972).

7 U.S.—Constructors Ass'n of Western Pennsylvania v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), judgment aff'd, 573 F.2d 811 (3d Cir. 1978).

8 U.S.—Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

a. Employment Issues Implicating Due Process Concerns

§ 2094. Due process considerations regarding railroad employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185, 4188

Provisions of federal statutes governing railway employment have been upheld against due process challenges.

Various provisions of federal statutes governing railway employment,[1] such as the Railway Labor Act, which authorizes collective bargaining and requires employers to bargain or treat with the representatives of a majority of the employees of any appropriate unit or class,[2] and allows closed or union shop agreements,[3] have been held not to violate the due process guaranty. The provisions of the Railway Labor Act creating adjustment boards with authority to finally settle disputes which evolve otherwise unadjusted out of the grievance procedure agreed upon between the parties do not infringe due process,[4] but the conduct of such boards must satisfy the requirements of due process.[5] One will not be bound by a judgment of an adjustment board if one is not afforded an opportunity to challenge it,[6] and courts are invested with sufficient appellate jurisdiction over such boards to protect union members from a denial of due process.[7]

Due process requirements do not apply to the private action of a railroad in dismissing an employee.[8] In the matter of representation disputes under the Railway Labor Act, the requirements of due process merely dictate such investigation as the nature of the case demands and the full panoply of judicial procedure need not be used.[9]

Congress may grant, increase, or decrease benefits due under the Railroad Retirement Act subject to the due process limitations against patently arbitrary action lacking in rational justification.[10]

Footnotes

1 U.S.—United Transp. Union v. Consolidated Rail Corp., 535 F. Supp. 697 (Regional Rail Reorg. Ct. 1982) (severance provisions do not constitute deprivation of property without due process).

2 U.S.—Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937).
Mo.—Williams v. Atchison, T. & S. F. Ry. Co., 356 Mo. 967, 204 S.W.2d 693 (1947).

3 U.S.—International Ass'n of Machinists v. Street, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961).
Tex.—International Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776 (Tex. Civ. App. Amarillo 1954), judgment aff'd, 156 Tex. 340, 295 S.W.2d 412 (1956).

4 U.S.—Edwards v. St. Louis-San Francisco R. Co., 361 F.2d 946 (7th Cir. 1966).
As to due process as applicable to administrative proceedings for the adjustment of labor disputes and the regulation of labor relations, see § 2104.

5 U.S.—Chicago, R. I. & P. R. Co. v. Wells, 498 F.2d 913 (7th Cir. 1974); McDonald v. Penn Cent. Transp. Co., 337 F. Supp. 803 (D. Mass. 1972); Rinker v. Penn Central Transp. Co., 350 F. Supp. 217 (E.D. Pa. 1972).

6 U.S.—Burlington Northern Inc. v. American Ry. Sup'rs Ass'n, 527 F.2d 216 (7th Cir. 1975).

7 U.S.—Switchmen's Union of North America v. Clinchfield R. Co., 310 F. Supp. 606 (E.D. Tenn. 1969), judgment aff'd, 427 F.2d 161 (6th Cir. 1970).

8 U.S.—Di Blasi v. Baker, 404 F. Supp. 654 (D. Mass. 1975), aff'd, 539 F.2d 702 (1st Cir. 1976).

9 U.S.—Air Florida, Inc. v. National Mediation Bd., 534 F. Supp. 1 (S.D. Fla. 1982), dismissed, 720 F.2d 686 (11th Cir. 1983), also published at, 115 L.R.R.M. (BNA) 2064 (11th Cir. 1983).

10 U.S.—Hoffman v. Dodd, 331 F. Supp. 393 (N.D. Ill. 1971).
Dual benefits
Section of Act precluding dual benefits unless individual has been determined to be eligible by date of enactment does not violate due process by resting eligibility for benefits upon time when person's entitlement to those benefits has been determined by court or Railroad Retirement Board.
U.S.—Frock v. U.S. R. R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2095. Due process considerations regarding right to organize; seniority rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185
West's Key Number Digest, Labor and Employment 997 to 999, 1109, 1110, 1236, 1429

Because the right of laborers to organize for the promotion of better working conditions is within the protection of due process guaranties, statutes that restrain unjust interference with the right of employees to organize and bargain collectively cannot be considered arbitrary or capricious so as to constitute a denial of due process.

The right of laborers to organize for the promotion of better working conditions is within the protection of due process of law guaranties.[1] Thus, statutes that restrain unjust interference with the right of employees to organize and bargain collectively cannot be considered arbitrary or capricious so as to constitute a denial of due process.[2] Statutes and regulations authorizing collective bargaining and requiring employers to bargain or treat with the representatives of a majority of the employees of any appropriate unit or class do not violate the due process guaranty of the Fifth Amendment.[3]

On the other hand, there is no due process right for public employees to organize. Where there is no statutory provision granting employees of a federal entity, or representatives on their behalf, the right to bargain collectively, no such right is entitled to due process protection.[4]

An employee's seniority rights,[5] even if they arise under a collective bargaining agreement between the employee's union and the employer,[6] are the employee's exclusive property and within the protection of constitutional guaranties of due process of law. However, a collective bargaining agreement did not provide at-will employees with a due process property interest in their jobs where, even though the agreement stated that the seniority of an employee would terminate when that employee was terminated for just cause, that provision did not state that employees could be discharged only for just cause.[7]

Footnotes

1 Fla.—Pittman v. Nix, 152 Fla. 378, 11 So. 2d 791, 144 A.L.R. 1341 (1943).
La.—Godchaux Sugars, Inc. v. Chaisson, 227 La. 146, 78 So. 2d 673 (1955), judgment vacated on other grounds, 350 U.S. 899, 76 S. Ct. 184, 100 L. Ed. 790 (1955) (cause has become moot).
As to the right of employees to organize into unions, generally, see C.J.S., Labor Relations §§ 81 to 83.

2 U.S.—N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352 (1937).

3 U.S.—Elliott v. El Paso Elec. Co., 88 F.2d 505 (C.C.A. 5th Cir. 1937); Beman v. Bendix Products Corp., 89 F.2d 661 (C.C.A. 7th Cir. 1937).
Entrance to, or use of, company property
Regulation of labor relations board permitting qualified access to agricultural property by farm labor organizers has reasonable relation to valid public goal and is neither arbitrary nor discriminatory within meaning of due process standards.
Cal.—Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 128 Cal. Rptr. 183, 546 P.2d 687 (1976).
Collective bargaining unit
Provision which precludes guard employees from being included together with other employees in collective bargaining unit does not violate Fifth Amendment.
U.S.—International Broth. of Teamsters, Local 344 v. N.L.R.B., 568 F.2d 12 (7th Cir. 1977).

4 U.S.—Fraternal Order of Police v. Board of Governors of Federal Reserve System, 391 F. Supp. 2d 1 (D.D.C. 2005).
As to due process rights of public employees, see §§ 2105 to 2121.

5 U.S.—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, 63 F. Supp. 640 (W.D. La. 1945), judgment rev'd on other grounds, 159 F.2d 822 (C.C.A. 5th Cir. 1947).
Miss.—Stephenson v. New Orleans & N. E. R. Co., 180 Miss. 147, 177 So. 509 (1937).

6 U.S.—Primakow v. Railway Exp. Agency, 56 F. Supp. 413 (E.D. Wis. 1943).

7 U.S.—Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007).

16D C.J.S. Constitutional Law § 2096

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2096. Due process considerations regarding strikes and boycotts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185
West's Key Number Digest, Labor and Employment 997 to 999, 1109, 1110, 1236, 1429, 1436

The right to strike is not absolute and, in a proper case, it may be limited or qualified without violating due process of law requirements.

Although the right peaceably to strike or participate in a strike, or to work or refuse to work, and to choose the terms and conditions under which one will work are fundamental liberties within the protection of constitutional guaranties of due process of law, which may not be conditioned or abridged in the absence of great and immediate danger to the community,[1] the right to strike is not absolute,[2] and in a proper case, it may be limited or qualified without violating due process of law requirements.[3] Public employees carrying out traditional governmental functions do not have a constitutional right to organize themselves, to participate in collective bargaining, to strike, and/or to carry out pickets.[4] The right to strike can also be contracted away for a limited time without violating due process of law.[5]

Statutes that have been upheld against due process challenges include those prohibiting jurisdictional strikes by rival unions arising out of disputes as to which shall have the exclusive right to bargain collectively,[6] prohibiting strikes by public employees,[7] and prohibiting secondary boycotts.[8]

Footnotes

1 U.S.—Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945); Traffic Telephone Workers Federation of New Jersey v. Driscoll, 71 F. Supp. 681 (D.N.J. 1947).

2 Mich.—International Union of United Auto., Aircraft and Agr. Implement Workers of America, C. I. O. v. McNally, 325 Mich. 250, 38 N.W.2d 421 (1949), judgment rev'd on other grounds, 339 U.S. 454, 70 S. Ct. 781, 94 L. Ed. 978 (1950).

N.J.—Kitty Kelly Shoe Corp. v. United Retail Employees of Newark, N.J., Local No. 108, 126 N.J. Eq. 374, 9 A.2d 295 (Ch. 1939), order rev'd on other grounds, 126 N.J. Eq. 318, 8 A.2d 767 (Ct. Err. & App. 1939).

3 U.S.—U.S. v. Avco Corp., Lycoming Division, Stratford, Conn., 270 F. Supp. 665 (D. Conn. 1967).

Mich.—International Union of United Auto., Aircraft and Agr. Implement Workers of America, C. I. O. v. McNally, 325 Mich. 250, 38 N.W.2d 421 (1949), judgment rev'd on other grounds, 339 U.S. 454, 70 S. Ct. 781, 94 L. Ed. 978 (1950).

N.Y.—People v. Local 365 Cemetery Workers Green Attendants Bldg. Service Union-Employees Intern. AFL-CIO, 76 Misc. 2d 148, 349 N.Y.S.2d 883 (Sup 1973).

4 U.S.—Federacion de Maestros de Puerto Rico v. Acevedo-Vila, 545 F. Supp. 2d 219, 232 Ed. Law Rep. 648 (D.P.R. 2008).

5 Ark.—Lion Oil Co. v. Marsh, 220 Ark. 678, 249 S.W.2d 569 (1952).

Agreement to arbitrate

The constitutional right of employees to strike is not impaired by a voluntary contract under which they agree to arbitrate their differences and to forgo their right to strike.

U.S.—Shirley-Herman Co. v. International Hod Carriers, Bldg. & Common Laborers Union of America, Local Union No. 210, 182 F.2d 806, 17 A.L.R.2d 609 (2d Cir. 1950).

6 Cal.—Sommer v. Metal Trades Council of Southern Cal., 40 Cal. 2d 392, 254 P.2d 559 (1953).

7 Conn.—McTigue v. New London Ed. Ass'n, 164 Conn. 348, 321 A.2d 462 (1973).

N.Y.—Buffalo Teachers' Federation, Inc. v. Helsby, 35 A.D.2d 318, 316 N.Y.S.2d 125 (3d Dep't 1970).

Ohio—Abbott v. Myers, 20 Ohio App. 2d 65, 49 Ohio Op. 2d 85, 251 N.E.2d 869 (10th Dist. Franklin County 1969).

R.I.—School Committee of Town of Westerly v. Westerly Teachers Ass'n, 111 R.I. 96, 299 A.2d 441 (1973).

8 U.S.—United Brick & Clay Workers of America v. Deena Artware, Inc., 198 F.2d 637 (6th Cir. 1952); N. L. R. B. v. United Broth. of Carpenters and Joiners of America, Dist. Council of Kansas City, Mo., A. F. of L., 184 F.2d 60 (10th Cir. 1950).

Idaho—State v. Casselman, 69 Idaho 237, 205 P.2d 1131 (1949).

Administrative order

U.S.—N.L.R.B. v. Local 74, United Broth. of Carpenters & Joiners of America, A.F. of L., 181 F.2d 126 (6th Cir. 1950), judgment aff'd, 341 U.S. 707, 71 S. Ct. 966, 95 L. Ed. 1309 (1951).

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16D C.J.S. Constitutional Law § 2097

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2097. Due process considerations regarding picketing and publicity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1917, 1921, 4184, 4185, 4188

The right of labor unions and employees to disseminate truthful information concerning an existing labor dispute is within the protection of constitutional guaranties of due process of law, and because of its element of communication, picketing, when properly exercised, is protected by such guaranties.

The right of labor unions or other individuals or organizations to disseminate truthful information concerning an existing labor dispute is within the protection of constitutional guaranties of due process of law,[1] and this right is not limited to the employer and employees who are directly involved in the controversy.[2]

Picketing, when properly exercised, will be protected under due process of law guaranties because of its element of communication,[3] and may not be prohibited where it is for a lawful purpose,[4] where it is carried on at proper places and for lawful purposes in connection with a bona fide labor dispute,[5] or where there is a lawful labor dispute between the union and the employer and the union pickets in a manner which honestly and truthfully informs the public as to the dispute.[6]

Picketing is not an absolute right,[7] and reasonable regulations may be imposed on it[8] by either legislation or by court action.[9] However, statutes which forbid all picketing,[10] or which are so broadly drawn as to prohibit picketing for a lawful purpose, unaccompanied by actual or threatened force, and limited to truthful publication of the facts of a dispute,[11] are invalid. An injunction against peaceful picketing, nothing else appearing, is also a violation of constitutional guaranties,[12] and an employer has no due process right to enjoin picketing on its property.[13]

Footnotes

1 U.S.—Carlson v. People of State of Cal., 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940).
Ky.—Paducah Newspapers v. Wise, 247 S.W.2d 989 (Ky. 1951).
Ohio—Nicholson v. Vending Mach. Service Emp., Local Union No. 410-A, 63 Ohio L. Abs. 19, 104 N.E.2d 473 (C.P. 1952).
Tex.—International Union of Operating Engineers, Local No. 564 v. Cox, 148 Tex. 42, 219 S.W.2d 787 (1949).
Wis.—Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 269 Wis. 338, 69 N.W.2d 762 (1955).
W. Va.—Ohio Val. Advertising Corp. v. Union Local 207, Sign Painters, A. F. of L., 138 W. Va. 355, 76 S.E.2d 113 (1953).
As to the constitutional right of freedom of speech, see §§ 918 to 1133.

2 U.S.—American Federation of Labor v. Swing, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941).
W. Va.—Ohio Val. Advertising Corp. v. Union Local 207, Sign Painters, A. F. of L., 138 W. Va. 355, 76 S.E.2d 113 (1953).

3 U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).
Ky.—Broadway & Fourth Ave. Realty Co. v. Local No. 181, Hotel and Restaurant Emp. Union, 244 S.W.2d 746 (Ky. 1951).
Ohio—W. E. Anderson Sons Co. v. Local Union No. 311, Intern. Broth. of Teamsters, Chauffeurs, Stablemen & Helpers of America, 156 Ohio St. 541, 46 Ohio Op. 460, 104 N.E.2d 22 (1952).
Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).

4 Ark.—Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1950).
Cal.—M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. of Culinary etc. Union, 124 Cal. App. 3d 666, 177 Cal. Rptr. 690 (1st Dist. 1981).
La.—Hanson v. International Union of Operating Engineers Local No. 406, 79 So. 2d 199 (La. Ct. App. 1st Cir. 1955).
Mo.—State ex rel. Allai v. Thatch, 361 Mo. 190, 234 S.W.2d 1 (1950).
Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).

5 Tex.—Millmen Union, Local 324, AFL v. Missouri-Kansas-Texas R. Co. of Tex., 253 S.W.2d 450 (Tex. Civ. App. Waco 1952), writ refused n.r.e.

6 Ohio—Nicholson v. Vending Mach. Service Emp., Local Union No. 410-A, 63 Ohio L. Abs. 19, 104 N.E.2d 473 (C.P. 1952).

7 Wash.—Shively v. Garage Employees Local Union No. 44, 6 Wash. 2d 560, 108 P.2d 354 (1940).

8 Tex.—International Union of Operating Engineers, Local No. 564 v. Cox, 148 Tex. 42, 219 S.W.2d 787 (1949).
Va.—McWhorter v. Com., 191 Va. 857, 63 S.E.2d 20 (1951).
W. Va.—Ohio Val. Advertising Corp. v. Union Local 207, Sign Painters, A. F. of L., 138 W. Va. 355, 76 S.E.2d 113 (1953).

9 U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke, 339 U.S. 470, 70 S. Ct. 773, 94 L. Ed. 995, 57 Ohio L. Abs. 330, 13 A.L.R.2d 631 (1950).

Or.—Gilbertson v. Culinary Alliance and Bartenders' Union, Local No. 643, A.F. of L., 204 Or. 326, 282 P.2d 632 (1955).
Va.—Edwards v. Com., 191 Va. 272, 60 S.E.2d 916 (1950).
W. Va.—Ohio Val. Advertising Corp. v. Union Local 207, Sign Painters, A. F. of L., 138 W. Va. 355, 76 S.E.2d 113 (1953).

10 U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).

11 Cal.—Ex parte Bell, 19 Cal. 2d 488, 122 P.2d 22 (1942).
Colo.—People v. Harris, 104 Colo. 386, 91 P.2d 989, 122 A.L.R. 1034 (1939).
Va.—Edwards v. Com., 191 Va. 272, 60 S.E.2d 916 (1950).

12 Tenn.—Rowe Transfer & Storage Co. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 621, A.F.L., 186 Tenn. 265, 209 S.W.2d 35 (1948).

13 Cal.—Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676 (1979).

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16D C.J.S. Constitutional Law § 2098

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2098. Due process considerations regarding picketing and publicity—Acts that may be prohibited

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1917, 1921, 4184, 4185, 4188

The State may restrain, without violating due process of law, acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

The State may restrain, without violating due process of law, acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.[1] Due process of law is not violated by an injunction or legislative enactment which restrains or prohibits picketing by acts of violence or other nonpeaceful means[2] or interference with a person's right to work by threats, intimidation, or otherwise,[3] or which restrains peaceful picketing when it is enmeshed with contemporaneously violent conduct,[4] or picketing conducted by a sit down strike or similar technique.[5] Similarly, due process is not violated by an injunction or legislative enactment which prohibits the persons picketing from invading or trespassing on the premises or property of another,[6] or which restrains or prohibits picketing where persistently untruthful or false and misleading signs have been displayed,[7] or picketing done in such a manner as to represent the existence of a labor dispute involving an employer-

employee relationship where that was not the case.[8] A statute which operates to legalize picketing where illegal methods are used deprives the employer of property without due process of law.[9]

It does not violate due process of law to prohibit by legislative enactment or to restrain by injunction, or to otherwise proscribe, picketing in furtherance of unlawful objectives or for unlawful purposes.[10] A state may restrain or prohibit picketing to force employees to join a union[11] or to force a closed or union shop,[12] or carried on for purposes in conflict with a state statute which declares a public policy against contracts limiting employment to union members.[13]

Where such conduct is contrary to statute, a court may restrain or prohibit picketing to coerce an employer into compelling employees, with whom the employer has no dispute, and regardless of their desires, into joining the picketing union,[14] to compel the employer to coerce employees' selection of a bargaining representative,[15] or to compel an employer to violate a penal statute.[16] Similarly, the court may restrain or prohibit picketing constituting a secondary boycott.[17]

Footnotes

1 U.S.—Building Service Employees Intern. Union, Local 262 v. Gazzam, 339 U.S. 532, 70 S. Ct. 784, 94 L. Ed. 1045, 57 Ohio L. Abs. 363 (1950).

2 U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).
Cal.—Ex parte Bell, 19 Cal. 2d 488, 122 P.2d 22 (1942).
Mo.—State ex rel. Allai v. Thatch, 361 Mo. 190, 234 S.W.2d 1 (1950).
N.Y.—Haber & Fink, Inc. v. Jones, 277 A.D. 176, 98 N.Y.S.2d 393 (1st Dep't 1950).
Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).

3 Va.—McWhorter v. Com., 191 Va. 857, 63 S.E.2d 20 (1951).

4 U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).

5 Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).
Blocking highway to mine
Wyo.—United Mine Workers of America Local 1972 v. Decker Coal Co., 774 P.2d 1274 (Wyo. 1989).

6 Tex.—Millmen Union, Local 324, AFL v. Missouri-Kansas-Texas R. Co. of Tex., 253 S.W.2d 450 (Tex. Civ. App. Waco 1952), writ refused n.r.e.

7 N.Y.—Willoughby Camera Stores v. District No. 15, Intern. Ass'n of Machinists, 205 Misc. 455, 129 N.Y.S.2d 734 (Sup 1954).

8 N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 29 A.L.R.2d 313 (1951).

9 U.S.—Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).

10 U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke, 339 U.S. 470, 70 S. Ct. 773, 94 L. Ed. 995, 57 Ohio L. Abs. 330, 13 A.L.R.2d 631 (1950).
Cal.—Sommer v. Metal Trades Council of Southern Cal., 40 Cal. 2d 392, 254 P.2d 559 (1953).
Conn.—Kenmike Theatre v. Moving Picture Operators, Local 304, American Federation of Labor, 139 Conn. 95, 90 A.2d 881 (1952).
Fla.—Miami Typographical Union No. 430 v. Ormerod, 61 So. 2d 753 (Fla. 1952).
La.—Hanson v. International Union of Operating Engineers Local No. 406, 79 So. 2d 199 (La. Ct. App. 1st Cir. 1955).
Mich.—Way Baking Co. v. Teamsters & Truck Drivers Local No. 164, A.F. of L., 335 Mich. 478, 56 N.W.2d 357 (1953).
Mo.—Katz Drug Co. v. Kavner, 249 S.W.2d 166 (Mo. 1952).

N.J.—Cordey China Co. v. United Mine Workers of America, Dist. 50, 25 N.J. Super. 514, 96 A.2d 696 (Ch. Div. 1953).
N.Y.—Haber & Fink, Inc. v. Jones, 277 A.D. 176, 98 N.Y.S.2d 393 (1st Dep't 1950).
Ohio—W. E. Anderson Sons Co. v. Local Union No. 311, Intern. Broth. of Teamsters, Chauffeurs, Stablemen & Helpers of America, 156 Ohio St. 541, 46 Ohio Op. 460, 104 N.E.2d 22 (1952).
Or.—Gilbertson v. Culinary Alliance and Bartenders' Union, Local No. 643, A.F. of L., 204 Or. 326, 282 P.2d 632 (1955).
Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).
Tex.—Construction and General Labor Union, Local No. 688 v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950).
Wash.—Morris v. Local Union No. 494 of Amalgamated Meat Cutters and Butcher Workmen of Spokane, 39 Wash. 2d 33, 234 P.2d 543 (1951).
Wis.—Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 269 Wis. 338, 69 N.W.2d 762 (1955).
Wyo.—Hagen v. Culinary Workers Alliance Local No. 337, 70 Wyo. 165, 246 P.2d 778 (1952).

Impeding travel to mine involved in labor dispute

Wyo.—United Mine Workers of America Local 1972 v. Decker Coal Co., 774 P.2d 1274 (Wyo. 1989).

11 Fla.—Miami Typographical Union No. 430 v. Ormerod, 61 So. 2d 753 (Fla. 1952).
Mich.—Way Baking Co. v. Teamsters & Truck Drivers Local No. 164, A.F. of L., 335 Mich. 478, 56 N.W.2d 357 (1953).
Wash.—Morris v. Local Union No. 494 of Amalgamated Meat Cutters and Butcher Workmen of Spokane, 39 Wash. 2d 33, 234 P.2d 543 (1951).

12 La.—Hanson v. International Union of Operating Engineers Local No. 406, 79 So. 2d 199 (La. Ct. App. 1st Cir. 1955).
Or.—Gilbertson v. Culinary Alliance and Bartenders' Union, Local No. 643, A.F. of L., 204 Or. 326, 282 P.2d 632 (1955).
Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).
Tex.—Construction and General Labor Union, Local No. 688 v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950).

13 U.S.—Local Union No. 10, United Ass'n of Journeymen Plumbers and Steamfitters of U.S. and Canada of A.F.L. v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946, 68 Ohio L. Abs. 269 (1953).

14 U.S.—International Broth. of Teamsters, Local 695, A.F.L. v. Vogt, Inc., 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957).

15 U.S.—Building Service Employees Intern. Union, Local 262 v. Gazzam, 339 U.S. 532, 70 S. Ct. 784, 94 L. Ed. 1045, 57 Ohio L. Abs. 363 (1950).

16 Pa.—Wortex Mills v. Textile Workers Union of America, C.I.O., 369 Pa. 359, 85 A.2d 851 (1952).

17 N.Y.—Willoughby Camera Stores v. District No. 15, Intern. Ass'n of Machinists, 205 Misc. 455, 129 N.Y.S.2d 734 (Sup 1954).
Ohio—W. E. Anderson Sons Co. v. Local Union No. 311, Intern. Broth. of Teamsters, Chauffeurs, Stablemen & Helpers of America, 156 Ohio St. 541, 46 Ohio Op. 460, 104 N.E.2d 22 (1952).
Wis.—Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 269 Wis. 338, 69 N.W.2d 762 (1955).

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16D C.J.S. Constitutional Law § 2099

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§ 2099. Due process considerations regarding closed or union shops

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4181, 4184, 4185, 4188

Constitutional or statutory provisions prohibiting discrimination by employers against either members or nonmembers of a union because of their status as such, including provisions which prohibit a closed or union shop, are not in violation of due process of law.

The Due Process Clause of the Federal Constitution does not preclude the states from prohibiting by law discrimination by employers against either members or nonmembers of unions because of their status as members or nonmembers.[1] They may pass laws designed to safeguard the opportunity of nonunion members to obtain and hold jobs, free from discrimination against them because they are nonunion workers,[2] and they also have power to ban contracts which if performed would bring about the prohibited discrimination.[3]

The provisions of the National Labor Relations Act, prohibiting employers from discouraging employees from becoming members of labor unions by discrimination with regard to hire, tenure, or condition of employment, and authorizing the

reinstatement, with or without back pay, of unfairly discharged employees,[4] do not violate the Due Process Clause.[5] An order of the National Labor Relations Board, that an employer reinstate employees discharged because of union membership activities and discharge those hired in their place, is likewise not a denial of due process.[6]

Due process of law is not violated by a legislative enactment or state constitutional provision which prohibits a closed or union shop[7] or which prohibits, as an unfair labor practice, discrimination by an employer and action by a labor union encouraging such discrimination so as to make union membership a condition of employment.[8] A requirement for financial support of a collective-bargaining agency by all who receive the benefits of its work does not violate due process.[9]

Where a union has entered into a closed or union shop agreement with employers, the right of the members to membership and their rights under such contracts are protected as against the union and its officers by the due process of law guaranties.[10]

Footnotes

1 U.S.—Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

2 Ariz.—American Federation of Labor v. American Sash & Door Co., 67 Ariz. 20, 189 P.2d 912 (1948), judgment aff'd, 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949).

3 U.S.—Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

4 29 U.S.C.A. §§ 158, 160(c).

5 U.S.—N.L.R.B. v. Waumbec Mills, 114 F.2d 226 (C.C.A. 1st Cir. 1940); National Labor Relations Board v. Tidewater Express Lines, 90 F.2d 301 (C.C.A. 4th Cir. 1937); Agwilines, Inc., v. National Labor Relations Board, 87 F.2d 146 (C.C.A. 5th Cir. 1936).

6 U.S.—Black Diamond S.S. Corp. v. N.L.R.B., 94 F.2d 875 (C.C.A. 2d Cir. 1938).

7 U.S.—American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949).
N.C.—State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).
Okla.—Eastern Oklahoma Bldg. & Const. Trades Council v. Pitts, 2003 OK 113, 82 P.3d 1008 (Okla. 2003).
Or.—Gilbertson v. Culinary Alliance and Bartenders' Union, Local No. 643, A.F. of L., 204 Or. 326, 282 P.2d 632 (1955).
Tenn.—Mascari v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America (AFL) Local Union No. 667, 187 Tenn. 345, 215 S.W.2d 779 (1948).
Va.—Finney v. Hawkins, 189 Va. 878, 54 S.E.2d 872 (1949).

8 U.S.—N.L.R.B. v. National Maritime Union of America, 175 F.2d 686 (2d Cir. 1949); International Union, United Mine Workers of America v. N.L.R.B., 184 F.2d 392 (D.C. Cir. 1950).

9 U.S.—Railway Emp. Dept. v. Hanson, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956).

10 Iowa—Nissen v. International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, 229 Iowa 1028, 295 N.W. 858, 141 A.L.R. 598 (1941).

16D C.J.S. Constitutional Law § 2100

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2100. Due process and procedural requirements for determining labor disputes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185
West's Key Number Digest, Labor and Employment 1340 to 1505

The procedure used in determining labor disputes must comport with due process requirements.

A party to a labor dispute has a constitutional right to procedural due process,[1] such as the right to representation by counsel,[2] before being deprived of a liberty or property interest. In determining the adequacy of a statute's predeprivation procedures, a court must consider the government's interest in imposing a temporary deprivation, the private interest of those affected by the deprivation, the risk of erroneous deprivations through challenged procedures, and the probable value of additional or substitute procedural safeguards.[3] There is no due process violation where predeprivation notice is provided and the deprivation at issue can be fully remedied through the grievance procedures provided for in a collective bargaining agreement.[4] Grievance procedures mandated by collective bargaining agreements are routinely, though not always, held to provide adequate postdeprivation due process.[5]

A labor organization is an adequate representative of the interest of the majority of its members, and its participation in an action satisfies due process requirements,[6] so that insofar as its interests are not antagonistic to those of the majority of its members, the members are bound by the judgment.[7]

Labor and management may contract privately to resolve disputes with less than a full evidentiary hearing without infringing on due process,[8] and grievance procedures provided by a collective bargaining agreement can satisfy an employee's entitlement to postdeprivation due process.[9]

A grievance procedure created under collective bargaining agreement can satisfy the requirements of due process.[10] However, the due process requirements of notice and opportunity to be heard apply in grievance proceedings and arbitration hearings,[11] and the existence of grievance procedures in a collective bargaining agreement does not automatically satisfy the employee's right to due process.[12]

An arbitrator's award which draws its essence from the collective bargaining contract and is based upon a plausible interpretation of the contract will not be held invalid on the grounds that the parties' due process rights have been violated.[13] In the absence of some unusual circumstance, a grievance-procedure agreement between a union and a private employer involves no state or federal action, and therefore the Due Process Clause is not applicable to such an agreement.[14] Due process does not preclude a governmental agency and the union that represents its employees from including a grievance arbitration provision in their collective bargaining agreement, where there is also an alternative procedure that provides a trial-type hearing.[15]

Footnotes

1 U.S.—United Technologies Corp., Pratt & Whitney Aircraft Group v. Marshall, 464 F. Supp. 845 (D. Conn. 1979).

2 U.S.—U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990).

3 U.S.—Brock v. Roadway Exp., Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

4 U.S.—Coollick v. Hughes, 699 F.3d 211, 286 Ed. Law Rep. 72 (2d Cir. 2012).

5 U.S.—O'Connor v. Pierson, 426 F.3d 187, 202 Ed. Law Rep. 98 (2d Cir. 2005).

6 U.S.—Bolden v. Pennsylvania State Police, 578 F.2d 912, 25 Fed. R. Serv. 2d 696 (3d Cir. 1978).
Minn.—Eisen v. State, Dept. of Public Welfare, 352 N.W.2d 731 (Minn. 1984).
Union standing
Union could assert membership standing, in due process claim against public employer based on handling of former employee's grievance and arbitration of his termination, where union asserted that employer's policies would cause union membership to face same sort of problems in future grievance and arbitration procedures as faced by former employee.
U.S.—Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 (7th Cir. 1995).

7 U.S.—Bolden v. Pennsylvania State Police, 578 F.2d 912, 25 Fed. R. Serv. 2d 696 (3d Cir. 1978).

8 U.S.—Merchants Despatch Transp. Corp. v. System Federation Number One Ry. Emp. Dept., AFL-CIO, Carmen, 447 F. Supp. 799 (N.D. Ill. 1978).
No presuspension hearing
There was no due process violation because bargaining agreement between labor union and state department of correctional services failed to provide for hearing prior to suspension without pay of corrections officer charged with commission of crime.
U.S.—Smith v. Carey, 473 F. Supp. 268 (S.D. N.Y. 1979).

9 U.S.—Farhat v. Jopke, 370 F.3d 580, 188 Ed. Law Rep. 108, 2004 FED App. 0158P (6th Cir. 2004).

10 U.S.—O'Connor v. Pierson, 426 F.3d 187, 202 Ed. Law Rep. 98 (2d Cir. 2005).
Conn.—Tedesco v. City of Stamford, 222 Conn. 233, 610 A.2d 574 (1992).

Haw.—Hoopai v. Civil Service Com'n, 106 Haw. 205, 103 P.3d 365 (2004).
Me.—Ryan v. City of Augusta, 622 A.2d 74, 81 Ed. Law Rep. 920 (Me. 1993).
S.D.—Beville v. University of South Dakota/South Dakota Bd. of Regents, 420 N.W.2d 9, 45 Ed. Law Rep. 260 (S.D. 1988).

11 U.S.—Williams v. International Ass'n of Machinists and Aerospace, Workers, 484 F. Supp. 917 (S.D. Fla. 1978), judgment aff'd, 617 F.2d 441 (5th Cir. 1980).
Cal.—International Brotherhood of Electrical Workers v. Silva, 96 Cal. App. 3d 751, 158 Cal. Rptr. 78 (5th Dist. 1979).
Pa.—School Dist. of City of Allentown v. Allentown Ed. Ass'n, 23 Pa. Commw. 224, 351 A.2d 292 (1976).

12 Conn.—Tedesco v. City of Stamford, 222 Conn. 233, 610 A.2d 574 (1992).

13 U.S.—Schlesinger v. Building Service Emp. Intern. Union, Local 252, AFL-CIO, 367 F. Supp. 760 (E.D. Pa. 1973).
R.I.—Burns v. Segerson, 122 R.I. 123, 404 A.2d 500 (1979).

Arbitrator's decision not arbitrary or capricious

U.S.—United Steelworkers of America, AFL-CIO v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974).

14 U.S.—Bures v. Houston Symphony Soc., 503 F.2d 842 (5th Cir. 1974).

15 U.S.—Malone v. U.S. Postal Service, 526 F.2d 1099 (6th Cir. 1975).

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16D C.J.S. Constitutional Law § 2101

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

1. Due Process Considerations

b. Labor Relations

§ 2101. Due process considerations regarding regulation of labor unions generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185
West's Key Number Digest, Labor and Employment 987 to 1091

The imposition of reasonable regulations on labor unions is not a violation of due process of law.

The imposition of reasonable regulations on labor unions is not a violation of due process of law.[1] The generally accepted test to determine whether a state's exercise of its power to regulate labor unions conforms with due process of law is to ascertain whether the law is reasonable and not arbitrary or capricious and whether the means selected have a real and substantial relation to the objects sought to be attained.[2]

A statute or order forbidding labor organizations from denying membership because of race, color, or creed,[3] or requiring such organizations to participate in a minority employment training program,[4] does not deny due process of law to labor unions.

A union is a private entity, not a state actor subject to regulation by the U.S. Constitution, precluding a union member's claim that the union has denied the member due process of law.[5]

A union acting under a statute authorizing it to collect agency shop fees from persons who are neither members of the union nor willing contributors to it must act within the limitations of the Due Process Clause.[6] Similarly, procedures used in union elections must comply with due process requirements.[7]

Footnotes

1 Tex.—American Federation of Labor v. Mann, 188 S.W.2d 276 (Tex. Civ. App. Austin 1945).
Union activities
Collective bargaining, self-organization, and other kindred union activities may be regulated by state on any reasonable basis not in conflict with superior law.
U.S.—American Federation of Labor v. Watson, 60 F. Supp. 1010 (S.D. Fla. 1945), judgment rev'd on other grounds, 327 U.S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946).
Felons
(1) Provision of act which in effect disqualifies ex-felons from waterfront union office, under all circumstances, constitutes reasonable means for achieving legitimate state aim and does not violate due process.
U.S.—De Veau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960).
(2) Statute which prohibits convicted felon whose citizenship has not been restored from holding any office in labor union or acting as labor organizer is valid.
Tex.—American Federation of Labor v. Mann, 188 S.W.2d 276 (Tex. Civ. App. Austin 1945).

2 Tex.—American Federation of Labor v. Mann, 188 S.W.2d 276 (Tex. Civ. App. Austin 1945).

3 U.S.—Railway Mail Ass'n v. Corsi, 326 U.S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1945).

4 U.S.—U.S. v. Local Union No. 212 Intern. Broth. of Elec. Workers, 472 F.2d 634 (6th Cir. 1973).

5 U.S.—Velasquez v. Metro Fuel Oil Corp., 12 F. Supp. 3d 387 (E.D. N.Y. 2014).

6 N.Y.—Warner v. Board of Ed. of Gates Chili Central School Dist., 99 Misc. 2d 251, 415 N.Y.S.2d 939 (Sup 1979), opinion supplemented, 104 Misc. 2d 1021, 430 N.Y.S.2d 21 (Sup 1980).

7 U.S.—News/Sun Sentinel Co. v. N.L.R.B., 890 F.2d 430 (D.C. Cir. 1989).

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16D C.J.S. Constitutional Law § 2102

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§ 2102. Due process considerations regarding discipline or suspension by unions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4181, 4184, 4185, 4188

A labor union must conform to the requirements of due process of law in the discipline or suspension of members.

If a union seeks to take disciplinary action against a member, it must first provide the member with due process.[1] The procedural machinery for the trial of union members by one of its authorized tribunals must meet the requirements of due process of law.[2]

The Labor-Management Reporting and Disclosure Act[3] requires a "full and fair" hearing but does not require labor organizations to adhere to the Federal Rules of Civil Procedure, nor does it set forth specific prehearing discovery procedures; thus, a union has discretion as to when and what discovery is available to the parties involved in a disciplinary hearing so long as the basic requirements of due process are not violated.[4]

Due process requires that the accused in a union disciplinary proceeding be told, far enough in advance of the trial to be of some use; that the accused has a right to call witnesses and to cross-examine witnesses; and that the union member runs the risk

of incurring serious penalties.[5] A union member has the due process right to present evidence during the union's disciplinary hearing.[6] A member subject to union disciplinary hearings must be permitted to record those hearings at the member's own expense in a nonintrusive manner when the union itself produces no official recording.[7]

Due process also requires that a union member appealing a disciplinary decision be informed of the procedure for bringing an appeal.[8]

An essential element of a full and fair hearing is an impartial tribunal[9] which arrives at its decision on the basis of evidence which the accused has an opportunity to confront and rebut.[10]

Ex parte action by union officials to suspend officers or to administer the affairs of a local member union is in violation of due process where there is no adequate provision for a subsequent hearing and inadequate machinery for an appeal.[11]

Footnotes

1 Haw.—Casumpang v. ILWU Local 142, 108 Haw. 411, 121 P.3d 391 (2005), reconsideration filed, (Nov. 2, 2005).

2 U.S.—Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U., 605 F.2d 1228, 5 Fed. R. Evid. Serv. 113 (2d Cir. 1979); Ritz v. O'Donnell, 566 F.2d 731 (D.C. Cir. 1977).
Cal.—DeMille v. American Federation of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769, 175 A.L.R. 382 (1947).
La.—International Ass'n of Heat & Frost Insulators and Allied Workers Local Union No. 53 v. Paternostro, 142 So. 3d 284 (La. Ct. App. 5th Cir. 2014).
Neb.—Communications Workers of America Local 7400 v. Abrahamson, 228 Neb. 335, 422 N.W.2d 547 (1988).
Wash.—Mahoney v. Sailors' Union of the Pacific, 43 Wash. 2d 874, 264 P.2d 1095 (1953).
Wis.—Local 4453, USA, AFL-CIO v. Wilson, 88 Wis. 2d 699, 277 N.W.2d 809 (1979).

3 29 U.S.C.A. §§ 401 to 531.

4 U.S.—Keenan v. International Ass'n of Machinists and Aerospace Workers, 937 F. Supp. 2d 93 (D. Me. 2013).

5 U.S.—Reilly v. Sheet Metal Workers' Intern. Ass'n, AFL-CIO, 488 F. Supp. 1121 (S.D. N.Y. 1980).
Notice inadequate
Notice of union charges given some three months after charges were made, which did not mention members' rights to attorney or lay counsel under union constitution and did not specify with particularity nature and extent of charges that each member would be called upon to answer, were inadequate and deprived members of due process.
N.J.—Local 32, Professional Emp. Intern. Union, AFL-CIO v. Sabetay, 159 N.J. Super. 518, 388 A.2d 652 (Dist. Ct. 1978).

6 U.S.—Holschen v. International Union of Painters & Allied Trades/Painters Dist. Council #2, 598 F.3d 454 (8th Cir. 2010).

7 U.S.—Knight v. International Longshoremen's Ass'n., 457 F.3d 331 (3d Cir. 2006).

8 Cal.—Posner v. Utility Workers Union of America, 47 Cal. App. 3d 970, 121 Cal. Rptr. 423 (1st Dist. 1975).

9 U.S.—Knight v. International Longshoremen's Ass'n., 457 F.3d 331 (3d Cir. 2006); Tincher v. Piasecki, 520 F.2d 851 (7th Cir. 1975); Myers v. Affiliated Property Craftsmen Local No. 44 of Intern. Alliance of Theatrical Stage Emp. and Moving Picture Mach. Operators of U. S. and Canada, 667 F.2d 817 (9th Cir. 1982).
Wis.—Local 4453, USA, AFL-CIO v. Wilson, 88 Wis. 2d 699, 277 N.W.2d 809 (1979).
Mixture of prosecutorial and judicial functions

Mixture of prosecutorial and judicial functions in union disciplinary proceeding, by permitting person to initiate charges and then adjudge or appoint another to adjudge guilt or innocence of charged party, does not violate due process.

U.S.—Ritz v. O'Donnell, 413 F. Supp. 1365 (D.D.C. 1976), judgment aff'd, 566 F.2d 731 (D.C. Cir. 1977).

10 U.S.—Tincher v. Piasecki, 520 F.2d 851 (7th Cir. 1975).

11 N.Y.—Garcia v. Ernst, 101 N.Y.S.2d 693 (Sup 1950).

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16D C.J.S. Constitutional Law § 2103

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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1. Due Process Considerations

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§ 2103. Due process considerations regarding equitable relief in labor disputes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4155 to 4162, 4177, 4181, 4182, 4184, 4185, 4188

Statutory provisions authorizing or limiting equitable relief in labor disputes are not in violation of due process of law.

The requirements of due process of law do not prevent a state from withdrawing the remedy of injunction from labor controversies[1] or, on the other hand, make unconstitutional the use of an injunction[2] where a statute provides reasonable notice and an opportunity for workers to be heard prior to the granting of injunctive relief.[3] A statute authorizing an injunction against strikes when the national welfare is imperiled is not in violation of due process of law.[4]

The provision of the Labor Management Relations Act authorizing suits against unincorporated labor organizations for violations of collective bargaining contracts in an industry affecting interstate commerce is not invalid as in violation of the guaranty of due process of law.[5]

Footnotes

1 U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).
Ariz.—Culinary Workers and Bartenders Local Union No. 631 A. F. of L. v. Busy Bee Cafe, 57 Ariz. 514, 115 P.2d 246 (1941).
Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 106 Colo. 25, 101 P.2d 436 (1940).

2 U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941); N.L.R.B. v. Sanford Home for Adults, 669 F.2d 35 (2d Cir. 1981).

3 Conn.—Papa v. New Haven Federation of Teachers, 186 Conn. 725, 444 A.2d 196, 3 Ed. Law Rep. 998 (1982).
La.—Baton Rouge Coca-Cola Bottling Co., Ltd. v. General Truck Drivers, Warehousemen and Helpers, Local Union No. 5, 403 So. 2d 632 (La. 1981).

4 U.S.—U.S. v. International Union, United Mine Workers of America, 89 F. Supp. 187 (D. D.C. 1950).

5 **Application to unincorporated associations**
Congress was not required to make provision of Labor Management Relations Act for suits by and against labor organizations applicable to all unincorporated associations since there is no requirement of uniformity in connection with Commerce Clause.
U.S.—Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp. 162 (S.D. N.Y. 1949).

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1. Due Process Considerations

b. Labor Relations

§ 2104. Due process considerations regarding administrative proceedings for adjustment of labor disputes and regulation of labor relations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4184, 4185

Administrative proceedings for the adjustment of labor disputes and the regulation of labor relations must be in conformity with the requirements of due process of law.

To comport with due process, the National Labor Relations Board may not find that an unfair practice exists without first affording the alleged violator notice and an opportunity for a hearing, which requires ordinarily that the complaint contain notice of the particular violations charged.[1] The National Labor Relations Board, like all administrative agencies, has broad authority to fashion its own procedures for developing the evidence on which it bases its decisions.[2]

The requirements of due process of law apply to the proceedings and orders of administrative boards and officers for the adjustment of labor disputes and the regulation of labor relations,[3] and the failure of a labor relations board to comply with applicable statutory requirements violates due process.[4] Due process requires that notice,[5] an opportunity to be heard,[6] and an

opportunity to confront and cross-examine witnesses and to produce evidence and witnesses to refute the charges made[7] be given persons and associations whose rights and liberties will be affected by the proceedings.[8]

Due process does not always require that labor relations boards act only after the benefit of a hearing,[9] or that a hearing be held at the initial stage, or at any particular point, or at more than one point of the proceeding.[10] It does not violate due process for such administrative agencies to exercise discretion in functional and operational matters without a hearing,[11] or to determine administrative and preliminary matters to a controversy without a hearing,[12] or to deny a hearing to a labor organization which has not filed specified reports and information with a specified government official as required by statute.[13] The failure of a labor relations board to conduct a postelection hearing in representation proceedings does not constitute a denial of due process,[14] but due process requires that a party to a representation election be given a hearing if it demonstrates the existence of substantial and material factual issues which, if resolved in its favor, would require the setting aside of the election.[15]

Where notice and a hearing are required, due process requires that the parties have a fair and impartial trial or hearing,[16] before an unbiased and nonpartisan trier of fact.[17] However, a mere error of the labor relations board or administrative officer,[18] such as using evidence for purposes other than those for which it was admitted,[19] providing insufficient notice, where the issues are fully and fairly litigated,[20] admitting irrelevant testimony, where the decree is supported by substantial proper evidence,[21] or combining investigatory, prosecutory, and quasi-judicial functions in the same officials,[22] does not constitute a denial of due process of law. On the other hand, permitting a labor union unfettered discretion to close the only route available for an employee's posttermination hearing flies in the face of the guarantee of procedural due process.[23]

The decision of a labor relations board after an administrative hearing must be governed by, and based on, the evidence produced at the hearing,[24] and the board's determination without consideration of the entire record constitutes a denial of due process of law.[25] Due process prohibits the enforcement of a finding by a labor relations board of a violation neither charged in the complaint nor litigated at the hearing.[26]

The failure to provide for review by appellate courts of a decision by an administrative board or agency with respect to the appropriate representative of employees for collective bargaining is not a denial of due process of law.[27]

CUMULATIVE SUPPLEMENT

Cases:

The due process clause does not require a precise statement of the theory upon which the General Counsel intends to proceed under the National Labor Relations Act (NLRA), with the threat that failure of precision in pleading will require the General Counsel to re-try the case; instead, notice must inform the respondent of the acts forming the basis of the complaint, i.e., the notice inquiry prioritizes substance over form. U.S. Const. Amend. 5; 29 C.F.R. § 102.15(b). Ozburn-Hessey Logistics, LLC v. National Labor Relations Board, 939 F.3d 777 (6th Cir. 2019).

State Labor Relations Board did not deprive 69 sworn law enforcement officers of procedural due process by dismissing New England Police Benevolent Association's (NEPBA) petition, seeking an election of new collective bargaining representatives among the officers, without a hearing; the Board investigated NEPBA's petition and dismissed it under the framework established by the Labor Relations Act. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; 3 V.S.A. § 941(d). In re New England Police Benev. Ass'n, 2016 VT 67, 148 A.3d 1002 (Vt. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Service Employees Intern. Union, Local 32BJ v. N.L.R.B., 647 F.3d 435 (2d Cir. 2011).

2 U.S.—Brentwood at Hobart v. N.L.R.B., 675 F.3d 999 (6th Cir. 2012).

3 U.S.—International Tel. & Tel. Corp., Communications Equipment and Systems Div. v. Local 134, Intern. Broth. of Elec. Workers, AFL-CIO, 419 U.S. 428, 95 S. Ct. 600, 42 L. Ed. 2d 558 (1975).
Cal.—Harry Carian Sales v. Agricultural Labor Relations Bd., 39 Cal. 3d 209, 216 Cal. Rptr. 688, 703 P.2d 27 (1985).
Vt.—In re Brooks, 135 Vt. 563, 382 A.2d 204 (1977).
Wis.—Kropiwka v. Department of Industry, Labor and Human Relations, 87 Wis. 2d 709, 275 N.W.2d 881 (1979).
As to due process in administrative proceedings, generally, see §§ 2010 to 2025.

4 Mich.—Mueller v. Local Joint Executive Bd. Hotel and Restaurant Emp. and Bartenders Intern. Union, AFL-CIO, 16 Mich. App. 334, 167 N.W.2d 806 (1969).

5 U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941); Alaska Roughnecks and Drillers Ass'n v. N.L.R.B., 555 F.2d 732 (9th Cir. 1977); Kairo-Scibek v. Wyoming Valley West School Dist., 880 F. Supp. 2d 549, 287 Ed. Law Rep. 916 (M.D. Pa. 2012), appeal dismissed, (3rd Cir. 12-3318) (Jan. 25, 2013).
Cal.—North San Diego County Transit Development Bd. v. Vial, 117 Cal. App. 3d 27, 172 Cal. Rptr. 440 (4th Dist. 1981).

6 U.S.—N.L.R.B. v. Prettyman, 117 F.2d 786 (C.C.A. 6th Cir. 1941); Allain v. Tummon, 212 F.2d 32 (7th Cir. 1954); Bradford v. Union Pacific R. Co., 767 F.3d 865 (9th Cir. 2014).
Cal.—Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd., 93 Cal. App. 3d 922, 156 Cal. Rptr. 152 (1st Dist. 1979).

7 U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941).

8 U.S.—Brock v. Roadway Exp., Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

9 U.S.—U.S. v. Feaster, 410 F.2d 1354 (5th Cir. 1969); Braden v. Herman, 468 F.2d 592 (8th Cir. 1972).
Cal.—Marshall v. Fair Employment Practice Com., 21 Cal. App. 3d 680, 98 Cal. Rptr. 698 (2d Dist. 1971).
Ill.—Dept. of Central Management Services/The Illinois Human Rights Com'n v. Illinois Labor Relations Bd., 406 Ill. App. 3d 310, 348 Ill. Dec. 240, 943 N.E.2d 1150 (4th Dist. 2010).
N.Y.—Kiernan v. Bronstein, 73 Misc. 2d 629, 342 N.Y.S.2d 977 (Sup 1973).

10 U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941).

11 U.S.—White v. Herzog, 80 F. Supp. 407 (D. D.C. 1948).

12 U.S.—American Rubber Products Corp v. N L R B, 214 F.2d 47 (7th Cir. 1954).
Craft or class determination by board
U.S.—United Transport Service Emp. of America, CIO, ex rel. Wash. v. National Mediation Bd., 179 F.2d 446 (D.C. Cir. 1949).

13 U.S.—White v. Douds, 80 F. Supp. 402 (S.D. N.Y. 1948).

14 U.S.—N.L.R.B. v. South Mississippi Elec. Power Ass'n, 616 F.2d 837 (5th Cir. 1980); N.L.R.B. v. Master Slack, 618 F.2d 6 (6th Cir. 1980); N.L.R.B. v. Metro-Truck Body, Inc., 613 F.2d 746 (9th Cir. 1979).

15 U.S.—N.L.R.B. v. Bristol Spring Mfg. Co., 579 F.2d 704 (2d Cir. 1978); Skyline Corp. v. N.L.R.B., 613 F.2d 1328 (5th Cir. 1980).

16 U.S.—N L R B v. West Tex Utilities Co., 214 F.2d 732 (5th Cir. 1954); N.L.R.B. v. May Dept. Stores Co., 154 F.2d 533 (C.C.A. 8th Cir. 1946).
Substantial-evidence rule

Adoption of substantial-evidence rule by labor relations board abandons neutrality and tilts towards state, thereby depriving grievant employee of due process.
Vt.—In re Grievance of Muzzy, 141 Vt. 463, 449 A.2d 970 (1982).

17 U.S.—Helena Laboratories Corp. v. N. L. R. B., 557 F.2d 1183 (5th Cir. 1977); N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local No. 13, 549 F.2d 1346 (9th Cir. 1977).

18 U.S.—N.L.R.B. v. Hearst, 102 F.2d 658 (C.C.A. 9th Cir. 1939).

19 U.S.—Rockingham Machine-Lunex Co. v. N.L.R.B., 665 F.2d 303 (8th Cir. 1981).

20 U.S.—N.L.R.B. v. Illinois Bell Telephone Co., 674 F.2d 618 (7th Cir. 1982).
Conn.—Connecticut State Labor Relations Bd. v. Connecticut Yankee Greyhound Racing, Inc., 175 Conn. 625, 402 A.2d 777 (1978).
Ill.—Florsheim Shoe Co. v. Illinois Fair Employment Practices Commission, 99 Ill. App. 3d 868, 55 Ill. Dec. 46, 425 N.E.2d 1219 (1st Dist. 1981).

21 U.S.—Berkshire Knitting Mills v. N.L.R.B., 139 F.2d 134 (C.C.A. 3d Cir. 1943); Rockingham Machine-Lunex Co. v. N.L.R.B., 665 F.2d 303 (8th Cir. 1981).

22 U.S.—N.L.R.B. v. Aaron Bros. Corp., 563 F.2d 409 (9th Cir. 1977).
Mass.—School Committee of Stoughton v. Labor Relations Commission, 4 Mass. App. Ct. 262, 346 N.E.2d 129 (1976).
N.Y.—Kiernan v. Bronstein, 73 Misc. 2d 629, 342 N.Y.S.2d 977 (Sup 1973).
Pa.—Pennsylvania Prevailing Wage Appeals Bd. v. Steve Black, Inc., 27 Pa. Commw. 21, 365 A.2d 685 (1976).
R.I.—La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, 419 A.2d 274 (R.I. 1980).

23 N.Y.—Sowich v. County of Oneida, 35 Misc. 3d 486, 938 N.Y.S.2d 413 (Sup 2011), order aff'd, 109 A.D.3d 1170, 971 N.Y.S.2d 720 (4th Dep't 2013).

24 U.S.—Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055 (1st Cir. 1981) (abrogated other grounds by, N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990)).

25 Mich.—Wayne County Sheriff's Dept. v. Michigan Labor Mediation Bd., 23 Mich. App. 309, 178 N.W.2d 512 (1970).

26 U.S.—Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055 (1st Cir. 1981) (abrogated on other grounds by, N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990)); N.L.R.B. v. Pepsi-Cola Bottling Co. of Topeka, Inc., 613 F.2d 267 (10th Cir. 1980); N. L. R. B. v. Blake Const. Co., Inc., 663 F.2d 272 (D.C. Cir. 1981).

27 U.S.—American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940).

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16D C.J.S. Constitutional Law § 2105

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

a. In General

§ 2105. Due process considerations regarding qualification for public office or employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4175, 4188, 4232

The right to hold public office or employment is not a liberty protected by the Due Process Clause. The legislature may prescribe the qualifications of public officers or employees, the method of their election or appointment, and their powers and duties.

The legislature, without violation of the guaranty of due process of law, may prescribe the qualifications of public officers,[1] including residency requirements,[2] the method of officers' election or appointment[3] and recall,[4] and their powers[5] and duties.[6] Changes may be made in a public officer's office, compensation, tenure of office, and duties without violating the Due Process Clause.[7] Term limitations imposed on state elective officials have been upheld against claims that they violate due process.[8] Election of state judges does not violate the Due Process Clause of the Fourteenth Amendment.[9]

The legislature, without violation of the guaranty of due process of law, may, furthermore, prescribe the qualifications of public employees, such as by providing for a preference for Indians or veterans.[10] However, eligibility for public employment may not

be denied illegally, arbitrarily, or capriciously.[11] Accordingly, due process of law is violated by educational requirements for a particular public employment which bear no rational relationship to the employment[12] although the evaluation and grading of education and experience in excess of the minimum requirements for a particular position, in determining eligibility for the position, do not violate due process.[13] Requiring a particular type of license to be hired for a position is a legitimate requirement if the license is relevant to the particular job.[14] On the other hand, due process is not necessarily denied by an exclusion from public employment on the basis of age,[15] a felony record,[16] or a past mental illness.[17]

The use of a polygraph test for preemployment screening of particular public employees does not violate the constitutional rights of the applicants to substantive due process.[18]

Footnotes

1 U.S.—Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).
Ohio—State ex rel. Watson v. Hamilton Cty. Bd. of Elections, 88 Ohio St. 3d 239, 2000-Ohio-318, 725 N.E.2d 255 (2000).

2 Wash.—Lawrence v. City of Issaquah, 84 Wash. 2d 146, 524 P.2d 1347 (1974).
Particular requirements invalidated
U.S.—McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972).
N.Y.—Phelan v. City of Buffalo, 54 A.D.2d 262, 388 N.Y.S.2d 469 (4th Dep't 1976).

3 Colo.—Board of Com'rs of Washington County v. Davis, 94 Colo. 330, 30 P.2d 266 (1934).
Tenn.—State v. Ritzius, 164 Tenn. 259, 47 S.W.2d 558 (1932).
Invalid delegation
S.C.—Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397 (1947).

4 U.S.—Gordon v. Leatherman, 450 F.2d 562 (5th Cir. 1971).
Fla.—Sproat v. Arnau, 213 So. 2d 692 (Fla. 1968).
N.J.—Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 (App. Div. 1968).

5 Ind.—Lund v. Board of Com'rs of Newton County, 47 Ind. App. 175, 93 N.E. 179 (1910).

6 U.S.—Soliah v. Heskin, 222 U.S. 522, 32 S. Ct. 103, 56 L. Ed. 294 (1912).

7 Ala.—Almon v. Morgan County, 245 Ala. 241, 16 So. 2d 511 (1944).
Redistricting
Candidate who could not run for office in election because redistricting statute postponed election in his district for two years was not unconstitutionally deprived of property right without due process of law; formation of legislative district was legislative process, not judicial process and, thus, candidate was not entitled to due process.
Neb.—Pick v. Nelson, 247 Neb. 487, 528 N.W.2d 309 (1995).

8 Ark.—U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994), judgment aff'd, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

9 Cicchini v. Blackwell, 127 Fed. Appx. 187, 2005 FED App. 0209N (6th Cir. 2005).

10 U.S.—Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) (Indians).
N.J.—Ballou v. State, Dept. of Civil Service, 75 N.J. 365, 382 A.2d 1118 (1978) (veterans).
Ohio—State ex rel. King v. Emmons, 47 Ohio App. 348, 15 Ohio L. Abs. 34, 191 N.E. 880 (2d Dist. Franklin County 1933), aff'd, 128 Ohio St. 216, 190 N.E. 468 (1934) (veterans).

11 U.S.—Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952); Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970); Davis v. Bucher, 451 F. Supp. 791, 26 Fed. R. Serv. 2d 60 (E.D. Pa. 1978).

12 U.S.—Richardson v. Civil Service Commission of State of N. Y., 387 F. Supp. 1267 (S.D. N.Y. 1973).

13 N.J.—Brown v. State, 115 N.J. Super. 348, 279 A.2d 872 (App. Div. 1971).

14 N.Y.—Carr v. New York State Dept. of Transp., 70 A.D.3d 1110, 894 N.Y.S.2d 557 (3d Dep't 2010) (commercial drivers license for position of highway maintenance worker).

15 R.I.—Power v. City of Providence, 582 A.2d 895 (R.I. 1990).

Rational need

Policy of Postal Service limiting age of appointment of beginners to position of postal inspectors to 34 years is rationally related to need for comparatively young, strong, and vigorous personnel in law enforcement departments, and thus, plaintiff, whose application for appointment of postal inspector was refused by the Service, was not denied due process or equal protection.

U.S.—Thomas v. U.S. Postal Inspection Service, 647 F.2d 1035 (10th Cir. 1981).

16 U.S.—McGarvey v. District of Columbia, 468 F. Supp. 687 (D.D.C. 1979).

Cal.—Hetherington v. State Personnel Bd., 82 Cal. App. 3d 582, 147 Cal. Rptr. 300 (3d Dist. 1978).

17 U.S.—Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976), opinion supplemented, 425 F. Supp. 984 (E.D. Mich. 1976).

18 U.S.—Anderson v. City of Philadelphia, 845 F.2d 1216 (3d Cir. 1988).

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16D C.J.S. Constitutional Law § 2106

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§ 2106. Due process in protection against conflicts of interest in public office or employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4173(4), 4174, 4175, 4188

Conflict of interest prohibitions which preclude public officers or employees from holding an elective office,[1] or engaging in other employment[2] which creates a conflict between private interests and public duties,[3] or voting on, or otherwise participating in the negotiation of, any contract with an entity in which the employee has a financial interest[4] have withstood challenges based on assertions that they violate due process of law.

Nepotism.

Antinepotism provisions prohibiting spouses from working together for the same public employer[5] or proscribing the appointment by a public officer or employee of any relative to a public office or employment[6] do not violate constitutional due process provisions. An antinepotism policy that prevents immediate family members from being employed by a department has a rational basis, including the goals of reducing favoritism or the appearance of favoritism and preventing family conflicts from affecting the workplace, and therefore the policy does not violate the fundamental right of marriage protected by substantive

due process.[7] However, an antinepotism statute which, if applied, would have the effect of terminating the employment of a person who was lawfully hired in the past runs afoul of the constitutional proscription against deprivation of liberty without due process of law.[8]

Financial disclosure.

Financial disclosure requirements applicable to judges,[9] elected or appointed public officials,[10] certain public employees[11] and their spouses and dependents,[12] candidates for public office,[13] and other persons who by virtue of their public position are subject to undue influence[14] have withstood challenges based on assertions that they violate due process of law. However, where the furnished information is made available to the public as a matter of course and where the party required to disclose its finances is not afforded an opportunity to present a claim for privacy,[15] or where the employer provides no basis for requiring the information and no safeguards against misuse or further disclosure of the information,[16] the infringement violates the employee's due process rights. It is a violation of due process to impose criminal liability upon officials for failure to disclose matters relating to family members since the officials might not have the means to acquire such information.[17]

Footnotes

1 U.S.—Wilson v. Moore, 346 F. Supp. 635 (N.D. W. Va. 1972).

2 Cal.—Baity v. Civil Service Com., 103 Cal. App. 3d 155, 162 Cal. Rptr. 812 (2d Dist. 1980).
Fla.—Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

3 Fla.—Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).
Ill.—Guzell v. Civil Service Commission, 17 Ill. App. 3d 266, 308 N.E.2d 351 (1st Dist. 1974).

4 Ga.—Willis v. Jackson, 148 Ga. App. 432, 251 S.E.2d 341 (1978).
Salary increase for spouse
W. Va.—Serge v. Matney, 165 W. Va. 801, 273 S.E.2d 818 (1980).

5 U.S.—Wright v. MetroHealth Medical Center, 58 F.3d 1130, 1995 FED App. 0207P (6th Cir. 1995); Parsons v. Del Norte County, 728 F.2d 1234 (9th Cir. 1984).

6 U.S.—Orange County, New York v. U.S. Dept. of Labor, 636 F.2d 889 (2d Cir. 1980).
Mo.—State ex inf. Roberts v. Buckley, 533 S.W.2d 551 (Mo. 1976).

7 U.S.—Woodard v. County of Wilson, 393 Fed. Appx. 125 (4th Cir. 2010); Wright v. MetroHealth Medical Center, 58 F.3d 1130, 1995 FED App. 0207P (6th Cir. 1995).

8 Utah—Backman v. Bateman, 1 Utah 2d 153, 263 P.2d 561 (1953).

9 U.S.—Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).
Wis.—In re Kading, 70 Wis. 2d 508, 235 N.W.2d 409 (1975), opinion supplemented, 70 Wis. 2d 508, 239 N.W.2d 297 (1976).

10 Pa.—Snider v. Shapp, 45 Pa. Commw. 337, 405 A.2d 602 (1979).

11 Ala.—Gideon v. Alabama State Ethics Commission, 379 So. 2d 570 (Ala. 1980).

12 Ala.—Gideon v. Alabama State Ethics Commission, 379 So. 2d 570 (Ala. 1980).
N.J.—Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (App. Div. 1976), judgment aff'd, 75 N.J. 458, 383 A.2d 428 (1978).

13 Pa.—Pennsylvania State Ass'n of Tp. Sup'rs v. Thornburgh, 45 Pa. Commw. 361, 405 A.2d 614 (1979).

14 Ill.—Illinois State Emp. Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974).

15 N.Y.—Hunter v. City of New York, 58 A.D.2d 136, 396 N.Y.S.2d 186 (1st Dep't 1977), order aff'd, 44 N.Y.2d 708, 405 N.Y.S.2d 455, 376 N.E.2d 928 (1978).

16 U.S.—Denius v. Dunlap, 209 F.3d 944, 143 Ed. Law Rep. 736 (7th Cir. 2000).

17 N.J.—Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (App. Div. 1976), judgment aff'd, 75 N.J. 458, 383 A.2d 428 (1978).

Pa.—Denoncourt v. Com., State Ethics Com'n, 504 Pa. 191, 470 A.2d 945, 15 Ed. Law Rep. 1209 (1983).

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16D C.J.S. Constitutional Law § 2107

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§ 2107. Substantive due process protections applied to termination of public office or employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4168, 4171, 4173(1) to 4175, 4188

Public employment terminations violate constitutional due process protections where they are effected because of an employee's exercise of a constitutional right, are based on an arbitrary ground, or are otherwise contrary to law.

Substantive due process protections preclude termination of public employment because of an employee's exercise of a fundamental constitutional right,[1] such as the right of freedom of speech or association,[2] or the privilege against self-incrimination,[3] whether or not the employee's property or liberty interests are affected by the termination,[4] and regardless of the fairness of the procedures used to implement the termination.[5] Areas in which substantive rights are created only by state law, such as tort law and employment law, are not subject to substantive due process protection under the Due Process Clause of the Federal Constitution.[6]

Generally, substantive due process is held to be violated by termination of public employment on arbitrary or capricious grounds[7] or for reasons that shock the conscience,[8] even where the terminated employee is not protected by statute[9] and has not acquired a property interest in an employment so as to be entitled to procedural due process with respect to its termination.[10] There is, however, authority to the contrary to the effect that a public employee's constitutional right to substantive due process is no greater than the right to procedural due process.[11] Under this view, a termination of public employment may not be challenged on substantive due process grounds because of its alleged arbitrariness where no property or liberty interests are infringed by the termination and where, accordingly, procedural due process need not be accorded to the employee being terminated.[12]

Constitutional due process protections may be infringed by termination of public employment on the basis of legally impermissible reasons,[13] such as an employee's race,[14] gender,[15] or pregnancy,[16] or by terminations which violate civil service legislation.[17]

Terminations of public employment have withstood challenges based on constitutional due process grounds where they have been based on employee conduct determined to be in violation of an existing regulation,[18] state or federal law,[19] or a contractual provision,[20] or to be disorderly[21] or unbecoming.[22]

Provisions authorizing the removal of judges for cause[23] or misconduct[24] which is prejudicial to the administration of justice[25] have been found not to be so vague as to violate due process of law. While due process has been held to require that an act on the basis of which a judicial officer is removable from office be designated as an offense at the time it is committed,[26] there is also authority to the contrary.[27]

While holders of patronage positions in a policy-making capacity may be discharged for no reason at all, even if they are performing their duties with all efficiency,[28] the dismissal of nonpolicymaking, nonconfidential public employees for the sole reason that they are not affiliated with, or sponsored by, a political party is generally unconstitutional under the Fourteenth Amendment.[29] In determining whether public employees may be discharged because of their political affiliation without violating the due process guaranty, the ultimate inquiry is not whether a particular position may be labeled "policymaking" or "confidential," but whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.[30] Under this rule, the Fourteenth Amendment is violated by the replacement, on purely political grounds, of public defenders.[31]

CUMULATIVE SUPPLEMENT

Cases:

County's alleged conduct in trumping up its employee's nonthreatening possession of knife as pretext to fire him in retaliation for his refusal to cooperate in investigation, if proven, did not shock the conscience, and thus did not violate employee's substantive due process rights. U.S. Const. Amend. 14, § 1. Catinella v. County of Cook, Illinois, 881 F.3d 514 (7th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Brown v. Hirst, 443 F.2d 899 (4th Cir. 1971); Kaprelian v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975); Perry v. McGinnis, 209 F.3d 597, 2000 FED App. 0133P (6th Cir. 2000); McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).
Kan.—Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984).
Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).

2 U.S.—Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Perry v. McGinnis, 209 F.3d 597, 2000 FED App. 0133P (6th Cir. 2000).
Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).
As to freedom of speech as relating to the discharge of public employees, see § 1061.
As to freedom of association as relating to public employees, see § 1162.

3 U.S.—Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956).
As to the privilege against self-incrimination under the Due Process Clause, generally, see § 1666.

4 Cal.—Figueroa v. Housing Authority, 131 Cal. App. 3d 528, 182 Cal. Rptr. 497 (1st Dist. 1982).
Lack of tenure
U.S.—Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).
As to property interests in public employment, see §§ 2113 et seq.
As to liberty interests involved in termination of public employment, see §§ 2119 et seq.

5 U.S.—McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

6 U.S.—McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

7 U.S.—Buhr v. Buffalo Public School Dist. No. 38, 509 F.2d 1196 (8th Cir. 1974).
Extramarital cohabitation
U.S.—Mindel v. U.S. Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970).

8 U.S.—Perry v. McGinnis, 209 F.3d 597, 2000 FED App. 0133P (6th Cir. 2000); McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).
Shocking the conscience
A public employee's removal from a trust position in a Puerto Rico administrative agency and reinstatement to her former career-level position with reduced salary and diminished responsibilities did not shock the conscience as required for a substantive due process claim.
U.S.—Maymi v. Puerto Rico Ports Authority, 515 F.3d 20 (1st Cir. 2008).

9 U.S.—Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

10 U.S.—Buhr v. Buffalo Public School Dist. No. 38, 509 F.2d 1196 (8th Cir. 1974); Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978).

11 U.S.—Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).

12 U.S.—Paige v. Harris, 584 F.2d 178 (7th Cir. 1978).
As to procedural due process upon termination of public employment in which the employee had a property or liberty interest, see §§ 2110 to 2112.

13 U.S.—Giannaris v. Frank, 387 F. Supp. 570 (N.D. Ill. 1974).

14 U.S.—Illinois State Employees Union, Council 34, Am. Federation of State, County and Municipal Employees, AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972).

15 U.S.—Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

16 U.S.—U.S. v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978).
Required leave held permissible
Where city had no per se rule requiring pregnant employees to take sick leave at any particular time during pregnancy, requiring policewoman to take unpaid maternity leave after third month of pregnancy did not deny her due process.
U.S.—Roller v. City of San Mateo, 572 F.2d 1311 (9th Cir. 1977).

17 U.S.—Norton v. Blaylock, 285 F. Supp. 659 (W.D. Ark. 1968), judgment aff'd, 409 F.2d 772 (8th Cir. 1969).

18 U.S.—Garrett v. City of Troy, 341 F. Supp. 633 (E.D. Mich. 1972), aff'd, 473 F.2d 912 (6th Cir. 1973).

19 U.S.—Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974).
Ohio—Adkins v. Myers, 15 Ohio Misc. 91, 44 Ohio Op. 2d 266, 239 N.E.2d 239 (C.P. 1968), judgment aff'd, 20 Ohio App. 2d 65, 49 Ohio Op. 2d 85, 251 N.E.2d 869 (10th Dist. Franklin County 1969).

20 Miss.—Jackson v. Hudspeth Mental Retardation Center, 573 So. 2d 750 (Miss. 1990).

21 Ala.—Thorne v. Birmingham Community Development, 409 So. 2d 862 (Ala. Civ. App. 1982).
Mont.—Storch v. Board of Directors of Eastern Montana Region Five Mental Health Center, 169 Mont. 176, 545 P.2d 644 (1976).

22 Cal.—Cranston v. City of Richmond, 40 Cal. 3d 755, 221 Cal. Rptr. 779, 710 P.2d 845 (1985).
Wash.—Porter v. Civil Service Commission of Spokane, 12 Wash. App. 767, 532 P.2d 296 (Div. 3 1975).

Conduct reflecting discredit upon city

U.S.—O'Neal v. City of Hot Springs Nat. Park, 756 F.2d 61 (8th Cir. 1985).

23 Ky.—Nicholson v. Judicial Retirement and Removal Commission, 562 S.W.2d 306 (Ky. 1978).
N.Y.—Friedman v. State, 24 N.Y.2d 528, 301 N.Y.S.2d 484, 249 N.E.2d 369 (1969).

Use of nolo contendere plea as cause permissible

Ga.—Matter of Inquiry Concerning Judge No. 491, 249 Ga. 30, 287 S.E.2d 2 (1982).

24 U.S.—Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971).

25 Ga.—Matter of Inquiry Concerning Judge No. 491, 249 Ga. 30, 287 S.E.2d 2 (1982).
Minn.—In re Gillard, 271 N.W.2d 785 (Minn. 1978).

26 Fla.—In re Inquiry Concerning a Judge, J. Q. C. No. 77-16, 357 So. 2d 172 (Fla. 1978).

27 Wis.—Matter of Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

28 U.S.—Duff v. Sherlock, 432 F. Supp. 423 (E.D. Pa. 1977).
N.M.—State ex rel. Duran v. Anaya, 1985-NMSC-044, 102 N.M. 609, 698 P.2d 882 (1985).
N.Y.—Gallagher v. Griffin, 93 Misc. 2d 174, 402 N.Y.S.2d 516 (Sup 1978).

29 U.S.—Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

30 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).
N.J.—Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 (1981).

31 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

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16D C.J.S. Constitutional Law § 2108

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

a. In General

§ 2108. Procedural due process protections applied to termination of public office or employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4168, 4171 to 4175, 4188

A public employee with a liberty or property interest in employment is entitled to due process before employment may be terminated.

Public employees with a liberty[1] or property[2] interest in their continued employment cannot be deprived of that interest by the State without due process.[3] Conversely, a public employee with no such interest in the position has no right to due process before employment is terminated.[4]

Absence without leave.

Although some jurisdictions have required hearings before a public employee may be dismissed for being absent without leave,[5] others have not, where other modes of review have been found to be sufficient.[6]

Staffing reductions.

Constitutional due process guaranties are ordinarily not implicated by terminations of public employment that are effected in order to reduce personnel[7] or which result from the abolition of a job,[8] so long as the action is not taken as a subterfuge for the discharge of particular employees[9] and is not otherwise improperly motivated,[10] even where the affected employees claim to have acquired a property interest in their terminated public employment.[11] However, even when budgetary considerations motivate a layoff, if performance factors play a role in eliminating a position, the employee has a right to minimal procedural protections of notice and an opportunity to respond.[12]

CUMULATIVE SUPPLEMENT

Cases:

Public employees who are dischargeable only for cause have due process property interest in continued employment and may not be deprived of that interest without notice and opportunity to be heard. U.S. Const. Amend. 14. Vargas v. Cook County Sheriff's Merit Board, 952 F.3d 871 (7th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Baraka v. McGreevey, 481 F.3d 187 (3d Cir. 2007); Hall v. City of Newport News, 469 Fed. Appx. 259 (4th Cir. 2012); Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913 (7th Cir. 2007); Stodghill v. Wellston School Dist., 512 F.3d 472, 228 Ed. Law Rep. 696 (8th Cir. 2008).
Iowa—Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989).
Miss.—Hall v. Board of Trustees of State Institutions of Higher Learning, 712 So. 2d 312, 127 Ed. Law Rep. 494 (Miss. 1998).
S.C.—Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987).
W. Va.—Roach v. Regional Jail Authority, 198 W. Va. 694, 482 S.E.2d 679 (1996).
Wis.—Kraus v. City of Waukesha Police and Fire Com'n, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294 (2003).
As to liberty interests in public employment, see §§ 2119 to 2121.

2 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Crews v. Monarch Fire Protection Dist., 771 F.3d 1085 (8th Cir. 2014); McDonald v. Wise, 769 F.3d 1202 (10th Cir. 2014).
Alaska—Jurgens v. City of North Pole, 153 P.3d 321 (Alaska 2007).
Del.—Stanford v. State Merit Employee Relations Bd., 44 A.3d 923 (Del. 2012).
Idaho—Gibson v. Ada County, 142 Idaho 746, 133 P.3d 1211 (2006).
Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).
Ind.—Speckman v. City of Indianapolis, 540 N.E.2d 1189 (Ind. 1989).
Kan.—McMillen v. U.S.D. No. 380, Marshall County, Kan., 253 Kan. 259, 855 P.2d 896, 84 Ed. Law Rep. 528 (1993).
La.—Lange v. Orleans Levee Dist., 56 So. 3d 925 (La. 2010).
Me.—Spiller v. State, 627 A.2d 513, 84 Ed. Law Rep. 320 (Me. 1993).

Mich.—State Employees Ass'n v. Department of Mental Health, 421 Mich. 152, 365 N.W.2d 93 (1984).
Mo.—Moore v. Board of Educ. of Fulton Public School No. 58, 836 S.W.2d 943, 77 Ed. Law Rep. 1019 (Mo. 1992).
Neb.—Nebraska Public Employees Local Union 251 v. Otoe County, 257 Neb. 50, 595 N.W.2d 237 (1999).
N.M.—Zamora v. Village of Ruidoso Downs, 1995-NMSC-072, 120 N.M. 778, 907 P.2d 182 (1995).
Okla.—Oklahoma Public Employees Ass'n v. Oklahoma Military Dept., 2014 OK 48, 330 P.3d 497 (Okla. 2014).
N.J.—J.E. on Behalf of G.E. v. State, Dept. of Human Services, Div. of Developmental Disabilities, 131 N.J. 552, 622 A.2d 227 (1993).
S.D.—Wuest v. Winner School Dist. 59-2, 2000 SD 42, 607 N.W.2d 912, 142 Ed. Law Rep. 1040 (S.D. 2000).
Tex.—County of Dallas v. Wiland, 216 S.W.3d 344 (Tex. 2007).
Utah—Becker v. Sunset City, 2013 UT 51, 309 P.3d 223 (Utah 2013).
Wis.—Arneson v. Jezwinski, 225 Wis. 2d 371, 592 N.W.2d 606, 134 Ed. Law Rep. 336 (1999).
As to property interests in public employment, see §§ 2113 to 2118.

3 U.S.—Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913 (7th Cir. 2007); Stodghill v. Wellston School Dist., 512 F.3d 472, 228 Ed. Law Rep. 696 (8th Cir. 2008); Hamilton v. Mayor & City Council of Baltimore, 807 F. Supp. 2d 331 (D. Md. 2011).

4 U.S.—Knappenberger v. City of Phoenix, 566 F.3d 936 (9th Cir. 2009); Collier v. Board of Tax Assessors of Augusta-Richmond County, 244 Fed. Appx. 265 (11th Cir. 2007); Whethers v. Nassau Health Care Corp., 956 F. Supp. 2d 364 (E.D. N.Y. 2013), aff'd, 578 Fed. Appx. 34 (2d Cir. 2014).
Ala.—Ex parte Craft, 727 So. 2d 55, 133 Ed. Law Rep. 286 (Ala. 1999).
Ark.—Sullivan v. Coney, 2013 Ark. 222, 427 S.W.3d 682 (2013).
Ga.—City of St. Marys v. Brinko, 324 Ga. App. 417, 750 S.E.2d 726 (2013).
La.—Moore v. Ware, 839 So. 2d 940 (La. 2003).
Me.—Lynch v. Lewiston School Committee, 639 A.2d 630, 90 Ed. Law Rep. 271 (Me. 1994).
Md.—Marriott v. Cole, 115 Md. App. 493, 694 A.2d 123, 118 Ed. Law Rep. 1065 (1997).
Miss.—Roberts v. Troutt, 475 So. 2d 421 (Miss. 1985).
Neb.—Nebraska Public Employees Local Union 251 v. Otoe County, 257 Neb. 50, 595 N.W.2d 237 (1999).
N.M.—Zamora v. Village of Ruidoso Downs, 1995-NMSC-072, 120 N.M. 778, 907 P.2d 182 (1995).
Okla.—Oklahoma Public Employees Ass'n v. Oklahoma Military Dept., 2014 OK 48, 330 P.3d 497 (Okla. 2014).

5 Mass.—Canney v. Municipal Court of City of Boston, 368 Mass. 648, 335 N.E.2d 651 (1975).
N.Y.—Johnson v. Director, Downstate Medical Center, State University of New York, 52 A.D.2d 357, 384 N.Y.S.2d 189 (2d Dep't 1976), order aff'd, 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837 (1977).

6 Cal.—Coleman v. Department of Personnel Administration, 52 Cal. 3d 1102, 278 Cal. Rptr. 346, 805 P.2d 300 (1991).
Fla.—Hadley v. Department of Administration, 411 So. 2d 184 (Fla. 1982).
Or.—McQuaid v. State Acc. Ins. Fund, 36 Or. App. 83, 583 P.2d 572 (1978).

7 U.S.—Babin v. Breaux, 587 Fed. Appx. 105 (5th Cir. 2014); Mayfield v. Kelly, 801 F. Supp. 795 (D.D.C. 1992).
Ga.—Brown v. State Merit System of Personnel Administration, 245 Ga. 239, 264 S.E.2d 186 (1980).
Ill.—Powell v. Jones, 56 Ill. 2d 70, 305 N.E.2d 166 (1973).

8 U.S.—Nolan v. Ramsey, 597 F.2d 577 (5th Cir. 1979); Esparza v. County of Los Angeles, 527 Fed. Appx. 638 (9th Cir. 2013) (elimination of department); Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014) (elimination of department).
N.Y.—Blyn v. Bartlett, 39 N.Y.2d 349, 384 N.Y.S.2d 99, 348 N.E.2d 555 (1976).
W. Va.—Baker v. Civil Service Commission, 161 W. Va. 666, 245 S.E.2d 908 (1978).

9 Ga.—City of Atlanta v. Mahony, 162 Ga. App. 5, 289 S.E.2d 250 (1982).

10 Ill.—Powell v. Jones, 56 Ill. 2d 70, 305 N.E.2d 166 (1973).
W. Va.—Baker v. Civil Service Commission, 161 W. Va. 666, 245 S.E.2d 908 (1978).

11 U.S.—Vargas v. Barcelo, 385 F. Supp. 879 (D.P.R. 1974), judgment aff'd, 532 F.2d 765 (1st Cir. 1976).

12 U.S.—Godin v. Machiasport School Dept. Bd. of Directors, 831 F. Supp. 2d 380, 279 Ed. Law Rep. 867 (D. Me. 2011) (citing precedents in First Circuit).

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§ 2109. Procedural due process protections applied to termination of public office or employment—Damage to reputation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4168, 4171 to 4175, 4188

An employee can invoke the protections of the Due Process Clause through a "stigma-plus" claim where that employee has suffered a loss of reputation coupled with the deprivation of a more tangible interest, such as government employment.

If a plaintiff successfully proves a claim that the plaintiff's government employer, in ordering termination, impugned the employee's good name, reputation, honor, or integrity, thus causing a stigma, that plaintiff must be accorded due process for having been deprived of a liberty interest; employees must be given the postdeprivation opportunity to clear their names.[1]

An employee can invoke the protections of the Due Process Clause through a "stigma-plus" claim where that employee has suffered a loss of reputation coupled with the deprivation of a more tangible interest, such as government employment.[2] The requisite stigma for a stigma-plus claim has generally been found when a public employer has accused an employee of serious character defects such as dishonesty, immorality, criminality, racism, and the like.[3] In determining the degree of dissemination

required for a stigma-plus claim, courts must look to the potential effect of dissemination on the public employee's standing in the community and the foreclosure of job opportunities.[4] No stigma-plus claim arises when, in the course of defaming a person, a public official solely impairs that person's future employment opportunities, without subjecting the employee to present injury such as termination of government employment.[5]

A hearing on such claims does not involve any right to remain employed but merely the right to clear the employee's name.[6]

Footnotes

1 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Palka v. Shelton, 623 F.3d 447 (7th Cir. 2010).
Cal.—Katzberg v. Regents of University of California, 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339, 171 Ed. Law Rep. 513 (2002).
D.C.—Leonard v. District of Columbia, 794 A.2d 618 (D.C. 2002).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).
N.Y.—Swinton v. Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 (1999).
Wis.—Kraus v. City of Waukesha Police and Fire Com'n, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294 (2003).
As to such claims, generally, see § 2119.

2 U.S.—Segal v. City of New York, 459 F.3d 207, 212 Ed. Law Rep. 21 (2d Cir. 2006).

3 Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

4 Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

5 U.S.—Ridpath v. Board of Governors Marshall University, 447 F.3d 292, 209 Ed. Law Rep. 32 (4th Cir. 2006).

6 S.C.—Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987).

16D C.J.S. Constitutional Law § 2110

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

a. In General

§ 2110. Requirements of procedural due process for termination of public office or employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4172(1) to 4172(7), 4173(4), 4174, 4175, 4188

A public employee has a due process right to notice and an opportunity to be heard before being deprived of employment in which the employee has a protected interest.

Once it is determined that a government employer's decision implicates a protected property or liberty interest, the court must then determine what process is constitutionally due by balancing three competing interests: (1) the private interest affected by the official action; (2) the governmental interest; and (3) the risk that erroneous deprivation of the private interest will occur, using the current procedures and the probable value, if any, of additional or substitute procedural safeguards.[1] The Due Process Clause does not require a trial-type hearing in every conceivable instance of governmental impairment of private rights.[2]

At a minimum, due process requires notice and an opportunity to be heard[3] at a meaningful time and in a meaningful manner[4] before an impartial tribunal,[5] an explanation of the employer's evidence,[6] the right to cross-examine adverse witnesses,[7] and the right for the employee to present evidence on the employee's own behalf,[8] and a decision based on substantial evidence.[9]

Although it has been held that due process does not require that the burden of proof be allocated to the employer,[10] it has also been held that imposing the burden of proof on the employee creates an impermissibly high risk that the employee will be erroneously terminated.[11]

Notice may be either oral or written,[12] must include an explanation of the evidence,[13] and must include each charge that is the basis for the termination.[14] If evidence is admitted in a discharge hearing to support a new charge for which a public employee was given no notice and had no time to prepare, the employee is entitled to assert a claim for violation of due process.[15]

The employee's opportunity to respond is an opportunity by the employee, either in person or in writing, to present reasons why the proposed action should not be taken.[16]

A public employee has no due process right to representation by counsel as long as the employee is not denied an opportunity to be heard.[17] Likewise, due process does not require that a stenographic record be made of a termination hearing.[18]

Due process does not preclude a government employer from sanctioning an employee for making false statements to the employer regarding the employee's alleged employment-related misconduct.[19]

Legislators.

Legislators subject to expulsion from the legislative body to which they have been elected must be afforded the minimum procedural due process requirements of the federal and state constitutions[20] and be provided with a notice and a hearing where the expulsion is based on charges involving criminal guilt, infamy, disgrace, or other grave injury to the legislator.[21] Although it has been held that elected officials have a property right in their office that cannot be taken away without due process of law,[22] it has also been held that an officer elected by the general public does not have a property right in the elected office that is subject to due process of law.[23]

CUMULATIVE SUPPLEMENT

Cases:

Due process in the context of a public employee's continued employment requires that the public employee have notice and an opportunity to be heard before termination of the employment. U.S. Const. Amend. 14. Cockfield v. City of Fargo, 2019 ND 77, 924 N.W.2d 403 (N.D. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 (7th Cir. 1995).
Cal.—California Teachers Ass'n v. State of California, 20 Cal. 4th 327, 84 Cal. Rptr. 2d 425, 975 P.2d 622, 138 Ed. Law Rep. 1147 (1999).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).
Minn.—Eisen v. State, Dept. of Public Welfare, 352 N.W.2d 731 (Minn. 1984).

Ohio—Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn., 68 Ohio St. 3d 175, 1994-Ohio-354, 624 N.E.2d 1043, 87 Ed. Law Rep. 599 (1994).

2 Cal.—Oberholzer v. Commission on Judicial Performance, 20 Cal. 4th 371, 84 Cal. Rptr. 2d 466, 975 P.2d 663 (1999).
Del.—Slawik v. State, 480 A.2d 636 (Del. 1984).
Mass.—Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 567 N.E.2d 924 (1991).

3 U.S.—Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010).
Ala.—Fowler v. Johnson, 961 So. 2d 122 (Ala. 2006).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Cal.—Mays v. City of Los Angeles, 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008).
Del.—Slawik v. State, 480 A.2d 636 (Del. 1984).
D.C.—Leonard v. District of Columbia, 794 A.2d 618 (D.C. 2002).
Haw.—Hoopai v. Civil Service Com'n, 106 Haw. 205, 103 P.3d 365 (2004).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
Me.—Moen v. Town of Fairfield, 1998 ME 135, 713 A.2d 321 (Me. 1998).
Miss.—Harris v. Mississippi Valley State University, 873 So. 2d 970, 188 Ed. Law Rep. 562 (Miss. 2004).
Mont.—Wolny v. City of Bozeman, 2001 MT 166, 306 Mont. 137, 30 P.3d 1085 (2001).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.M.—Zamora v. Village of Ruidoso Downs, 1995-NMSC-072, 120 N.M. 778, 907 P.2d 182 (1995).
Ohio—State ex rel. Zeigler v. Zumbar, 129 Ohio St. 3d 240, 2011-Ohio-2939, 951 N.E.2d 405 (2011).
Pa.—Woods v. State Civil Service Com'n, 590 Pa. 337, 912 A.2d 803 (2006).
Tex.—Bexar County Sheriff's Civil Service Com'n v. Davis, 802 S.W.2d 659 (Tex. 1990).
Vt.—Rich v. Montpelier Supervisory Dist., 167 Vt. 415, 709 A.2d 501, 125 Ed. Law Rep. 736 (1998).
Wis.—Milwaukee Dist. Council 48 v. Milwaukee County, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (2001).
Wyo.—Town of Evansville Police Dept. v. Porter, 2011 WY 86, 256 P.3d 476 (Wyo. 2011).

4 U.S.—Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), on reh'g, 928 F.2d 920 (10th Cir. 1991).
Del.—Slawik v. State, 480 A.2d 636 (Del. 1984).
Me.—Gorham v. Androscoggin County, 2011 ME 63, 21 A.3d 115 (Me. 2011).
Minn.—Eisen v. State, Dept. of Public Welfare, 352 N.W.2d 731 (Minn. 1984).

5 U.S.—Christiansen v. West Branch Community School Dist., 674 F.3d 927, 279 Ed. Law Rep. 43 (8th Cir. 2012); Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), on reh'g, 928 F.2d 920 (10th Cir. 1991).
Ala.—Stallworth v. City of Evergreen, 680 So. 2d 229 (Ala. 1996).
Conn.—Clisham v. Board of Police Com'rs of Borough of Naugatuck, 223 Conn. 354, 613 A.2d 254 (1992).
La.—Georgia Gulf Corp. v. Board of Ethics for Public Employees, 694 So. 2d 173 (La. 1997).
Miss.—Freeman v. Public Employees' Retirement System of Mississippi, 822 So. 2d 274 (Miss. 2002).
Neb.—Barnett v. City of Scottsbluff, 268 Neb. 555, 684 N.W.2d 553 (2004).
N.C.—Crump v. Board of Educ. of Hickory Administrative School Unit, 326 N.C. 603, 392 S.E.2d 579, 60 Ed. Law Rep. 1259 (1990).
N.D.—Rudnick v. City of Jamestown, 463 N.W.2d 632 (N.D. 1990).
S.C.—In re Zaman, 285 S.C. 345, 329 S.E.2d 436 (1985).
Utah—Nelson v. City of Orem, 2013 UT 53, 309 P.3d 237 (Utah 2013).
Vt.—Rich v. Montpelier Supervisory Dist., 167 Vt. 415, 709 A.2d 501, 125 Ed. Law Rep. 736 (1998).
Wis.—Milwaukee Dist. Council 48 v. Milwaukee County, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (2001).

6 U.S.—Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010); Schmidt v. Creedon, 639 F.3d 587 (3d Cir. 2011).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).

7 U.S.—Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014).

S.C.—In re Vora, 354 S.C. 590, 582 S.E.2d 413 (2003).
S.D.—Hollander v. Douglas County, 2000 SD 159, 620 N.W.2d 181 (S.D. 2000).
Utah—Harmon v. Ogden City Civil Service Com'n, 2007 UT App 336, 171 P.3d 474 (Utah Ct. App. 2007).
Wis.—Milwaukee Dist. Council 48 v. Milwaukee County, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (2001).

"Good cause" exception for confidential informant

U.S.—McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).

8 U.S.—Schmidt v. Creedon, 639 F.3d 587 (3d Cir. 2011).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Neb.—Hickey v. Civil Service Com'n of Douglas County, 274 Neb. 554, 741 N.W.2d 649 (2007).
S.D.—Hollander v. Douglas County, 2000 SD 159, 620 N.W.2d 181 (S.D. 2000).

9 U.S.—State of Mo. ex rel. Gore v. Wochner, 475 F. Supp. 274 (E.D. Mo. 1979), judgment aff'd, 620 F.2d 183 (8th Cir. 1980).
R.I.—In re Commission on Judicial Tenure and Discipline, 916 A.2d 746 (R.I. 2007).
Wyo.—Davis v. City of Cheyenne, 2004 WY 43, 88 P.3d 481 (Wyo. 2004).

Preponderance of evidence sufficient

Md.—Coleman v. Anne Arundel County Police Dept., 369 Md. 108, 797 A.2d 770 (2002).

10 N.C.—Peace v. Employment Sec. Com'n of North Carolina, 349 N.C. 315, 507 S.E.2d 272 (1998).

11 N.M.—City of Albuquerque v. Chavez, 1998-NMSC-033, 125 N.M. 809, 965 P.2d 928 (1998).

12 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
Miss.—Harris v. Mississippi Valley State University, 873 So. 2d 970, 188 Ed. Law Rep. 562 (Miss. 2004).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.M.—Daddow v. Carlsbad Mun. School Dist., 1995-NMSC-032, 120 N.M. 97, 898 P.2d 1235, 102 Ed. Law Rep. 319 (1995).
Vt.—In re Grievance of Towle, 164 Vt. 145, 665 A.2d 55 (1995).

13 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
Mont.—Wolny v. City of Bozeman, 2001 MT 166, 306 Mont. 137, 30 P.3d 1085 (2001).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.M.—Daddow v. Carlsbad Mun. School Dist., 1995-NMSC-032, 120 N.M. 97, 898 P.2d 1235, 102 Ed. Law Rep. 319 (1995).
Ohio—Kennedy v. Marion Correctional Inst., 69 Ohio St. 3d 20, 1994-Ohio-83, 630 N.E.2d 324 (1994).
Vt.—Rich v. Montpelier Supervisory Dist., 167 Vt. 415, 709 A.2d 501, 125 Ed. Law Rep. 736 (1998).
Wyo.—Lucero v. Mathews, 901 P.2d 1115 (Wyo. 1995).

14 Idaho—Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 (2002).
Wyo.—Davis v. City of Cheyenne, 2004 WY 43, 88 P.3d 481 (Wyo. 2004).

15 U.S.—Morrison v. Warren, 375 F.3d 468, 2004 FED App. 0223P (6th Cir. 2004).

16 Idaho—Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 (2002).
N.M.—Daddow v. Carlsbad Mun. School Dist., 1995-NMSC-032, 120 N.M. 97, 898 P.2d 1235, 102 Ed. Law Rep. 319 (1995).
Pa.—Woods v. State Civil Service Com'n, 590 Pa. 337, 912 A.2d 803 (2006).

17 U.S.—Gerhart v. Hayes, 201 F.3d 646, 141 Ed. Law Rep. 465 (5th Cir. 2000), opinion superseded in part on other grounds on denial of reh'g, 217 F.3d 320, 145 Ed. Law Rep. 654 (5th Cir. 2000).

Representation by union representative

Discharged state hospital employee was not denied due process by lack of legal representation at arbitration hearing at which employee contested discharge, where employee was not "party" under grievance procedures of collective bargaining agreement and was represented by union representative.
Minn.—Eisen v. State, Dept. of Public Welfare, 352 N.W.2d 731 (Minn. 1984).

18 Ohio—Local 4501, Communications Workers of America v. Ohio State University, 49 Ohio St. 3d 1, 550 N.E.2d 164, 58 Ed. Law Rep. 1000 (1990).

19 U.S.—LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998).

20 Ala.—State ex rel. James v. Reed, 364 So. 2d 303 (Ala. 1978).
Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).

21 U.S.—McCarley v. Sanders, 309 F. Supp. 8 (M.D. Ala. 1970).
La.—Gerald v. Louisiana State Senate, 408 So. 2d 426 (La. Ct. App. 1st Cir. 1981).

22 Ga.—Northway v. Allen, 291 Ga. 227, 728 S.E.2d 624 (2012).

23 R.I.—Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).

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16D C.J.S. Constitutional Law § 2111

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

§ 2111. Requirements of procedural due process for termination of public office or employment—Pretermination hearing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4172(1) to 4172(7), 4173(4), 4174, 4175

Due process requires some sort of pretermination hearing even where adequate posttermination procedures are provided.

Even where adequate posttermination procedures are provided for,[1] due process requires some sort of pretermination hearing.[2] Formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.[3] A pretermination hearing is not required if a compelling public policy dictates otherwise;[4] if the state must act quickly, if it would be impractical to provide predeprivation process;[5] if the only relevant factual issues can be resolved without a preaction hearing;[6] or if an applicable collective bargaining agreement waives the pretermination adversarial hearing and provides fair, reasonable, and efficacious procedures by which the dispute may be resolved.[7]

A pretermination proceeding need not be a full evidentiary hearing with a neutral decisionmaker, as long as the employee is given notice and an opportunity to respond, either in writing or in person,[8] as the pretermination hearing serves only as an initial check against mistaken decisions[9] and to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.[10] Because a state may cure a deprivation of procedural due process rights by providing a later remedy,[11] a limited or abbreviated pretermination hearing and the opportunity for a more comprehensive postdeprivation hearing provide the employee with all the process due.[12] A public officer or employee is provided due process of law even if not given notice of or a hearing at the initial administrative levels when the employee is afforded an adequate subsequent procedural remedy.[13]

CUMULATIVE SUPPLEMENT

Cases:

To satisfy minimal due-process requirements at pre-termination stage, public employer must give public employee oral or written notice of charges against him, explanation of employer's evidence, and opportunity to present his side of story. U.S. Const. Amend. 14. Raymond v. Board of Regents of the University of Minnesota, 847 F.3d 585 (8th Cir. 2017).

Former town employee sufficiently alleged a procedural due process claim by alleging that town charter indicated that an employee could only be removed "for cause" but that the "last chance agreement" that she was forced to sign indicated that she would henceforth be deemed an "at-will" employee who waived any pre-discipline/termination hearing rights she previously had, such that she had a protected property interest in her employment. U.S. Const. Amend. 14. Higgins v. Town of Concord, 246 F. Supp. 3d 502 (D. Mass. 2017).

Retired public employee who returned to work as village's police chief sufficiently alleged, in support of federal procedural due process claim in § 1983 action, that he was deprived of meaningful pre-termination opportunity to respond to mayor's memorandum stating that village had identified a non-retired candidate for role of police chief and that retiree was required to select one of three options, i.e., maintaining his salary and suspending his pension, reducing his salary to state-law maximum salary for returning to service without affecting state pension, or resigning. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; N.Y. Retirement and Social Security Law §§ 211(2)(b)(5)(ii), 212. Mullen v. Village of Painted Post, 356 F. Supp. 3d 275 (W.D. N.Y. 2019).

Fire chief was not deprived of a constitutionally protected property interest upon being terminated without hearing prescribed by fire department civil service board, an administrative body that purported to create a classified service to which fire chief belonged, where state law expressly prohibited local governments from establishing systems of classified service, and thus, the board was improperly formed and a legal nullity that had no power to confer a property interest in continued employment on fire chief, and chief pointed to no other state or local law as possible alternative basis for such interest. U.S. Const. Amend. 14; Tenn. Code Ann. § 5-23-108. Smallwood v. Cocke County Government, 290 F. Supp. 3d 755 (E.D. Tenn. 2018).

Because the pre-termination hearing was minimal, city's former planning and community development director was entitled to a more complete post-termination process. U.S.C.A. Const.Amend. 14. Hallsmith v. City of Montpelier, 2015 VT 83, 125 A.3d 882 (Vt. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 (7th Cir. 1995).

2 U.S.—Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); Carmody v. Board of Trustees of University of Illinois, 747 F.3d 470, 303 Ed. Law Rep. 802 (7th Cir. 2014).
Alaska—City of North Pole v. Zabek, 934 P.2d 1292 (Alaska 1997).
Cal.—Coleman v. Department of Personnel Administration, 52 Cal. 3d 1102, 278 Cal. Rptr. 346, 805 P.2d 300 (1991).
Iowa—Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989).
La.—Lange v. Orleans Levee Dist., 56 So. 3d 925 (La. 2010).
Mont.—Arredondo v. City of Billings Dept. of Police, 2006 MT 154N, 143 P.3d 702 (Mont. 2006).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.Y.—Prue v. Hunt, 78 N.Y.2d 364, 575 N.Y.S.2d 806, 581 N.E.2d 1052 (1991).
S.C.—Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62, 121 Ed. Law Rep. 1174 (1997).
W. Va.—White v. Barill, 210 W. Va. 320, 557 S.E.2d 374 (2001).

3 U.S.—Farhat v. Jopke, 370 F.3d 580, 188 Ed. Law Rep. 108, 2004 FED App. 0158P (6th Cir. 2004); Hudson v. City of Riviera Beach, 982 F. Supp. 2d 1318 (S.D. Fla. 2013).

4 W. Va.—White v. Barill, 210 W. Va. 320, 557 S.E.2d 374 (2001).
Where employee presents danger
If tenured employee presents danger to students or others at work and there is no reasonable way to abate danger, due process does not require pretermination hearing.
W. Va.—Board of Educ. of County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402, 97 Ed. Law Rep. 549 (1994).

5 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).

6 Minn.—Martin v. Itasca County, 448 N.W.2d 368 (Minn. 1989) (before unpaid leave of absence).

7 Alaska—Cassel v. State, Dept. of Admin., 14 P.3d 278 (Alaska 2000).

8 U.S.—Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); DeLuzio v. Monroe County, 271 Fed. Appx. 193 (3d Cir. 2008); Lane v. City of Pickerington, 588 Fed. Appx. 456 (6th Cir. 2014).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
La.—Lange v. Orleans Levee Dist., 56 So. 3d 925 (La. 2010).
Me.—Moen v. Town of Fairfield, 1998 ME 135, 713 A.2d 321 (Me. 1998).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.D.—Good Bird v. Twin Buttes School Dist., 2007 ND 103, 733 N.W.2d 601, 221 Ed. Law Rep. 355 (N.D. 2007).
S.C.—Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62, 121 Ed. Law Rep. 1174 (1997).
S.D.—Hollander v. Douglas County, 2000 SD 159, 620 N.W.2d 181 (S.D. 2000).
Pornographic photos on office computer
A city employee who was fired for having pornographic images on his work computer was denied adequate predeprivation due process where, at his pretermination hearing, he was denied the opportunity to see the photographs he was accused of viewing and retaining. This deprived him of a meaningful opportunity to tell his side of the story. A jury could find that the employee was not given notice of all the charges against him.
U.S.—Lane v. City of Pickerington, 588 Fed. Appx. 456 (6th Cir. 2014).

9 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
La.—Lange v. Orleans Levee Dist., 56 So. 3d 925 (La. 2010).
Me.—Moen v. Town of Fairfield, 1998 ME 135, 713 A.2d 321 (Me. 1998).
Md.—City of Annapolis v. Rowe, 123 Md. App. 267, 717 A.2d 976 (1998).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).

10 U.S.—Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); Carmody v. Board of Trustees of University of Illinois, 747 F.3d 470, 303 Ed. Law Rep. 802 (7th Cir. 2014).
La.—Lange v. Orleans Levee Dist., 56 So. 3d 925 (La. 2010).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).

11 U.S.—Smutka v. City of Hutchinson, 451 F.3d 522 (8th Cir. 2006); McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).
Alaska—City of North Pole v. Zabek, 934 P.2d 1292 (Alaska 1997).
Neb.—Buhrmann v. Sellentin, 218 Neb. 288, 352 N.W.2d 907 (1984).
S.C.—Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997).

12 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Kan.—McMillen v. U.S.D. No. 380, Marshall County, Kan., 253 Kan. 259, 855 P.2d 896, 84 Ed. Law Rep. 528 (1993).
Neb.—Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 (2010).
N.Y.—Hurwitz v. Perales, 81 N.Y.2d 182, 597 N.Y.S.2d 288, 613 N.E.2d 163 (1993).

13 Ga.—Camden County v. Haddock, 271 Ga. 664, 523 S.E.2d 291 (1999).
Md.—Mayer v. Montgomery County, 143 Md. App. 261, 794 A.2d 704 (2002).

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16D C.J.S. Constitutional Law § 2112

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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§ 2112. Requirements of procedural due process for termination of public office or employment—For removal or other discipline of judge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4172(1) to 4172(7), 4173(4), 4174, 4175, 4188

A judge is entitled to notice and an opportunity to be heard before being removed from office.

Any discipline of a judge, even a reprimand, is a serious matter and should be imposed only in compliance with due process requirements.[1] Compliance with due process requires that a judge subject to removal or other discipline be afforded adequate notice of the charges against the judge,[2] and an opportunity to present a defense,[3] and that the proceedings against the judge be essentially fair.[4] Due process also requires that the disciplinary body be in substantial compliance with its own procedural rules.[5]

Constitutional due process requirements are not violated by the disposition of charges against a judge by a body which combines various functions, i.e., investigatory, accusatory, and adjudicatory functions,[6] or by a hearing on judicial misconduct before a fact-finding body that includes nonlawyers.[7]

While not every right guaranteed to criminal defendants by the Federal Constitution is applicable to judicial removal proceedings,[8] due process requirements entitle judges subject to removal to avail themselves of the privilege against self-incrimination[9] and the right to cross-examine adverse witnesses.[10] Charges against a judge may be proven by clear and convincing evidence rather than by evidence which proves the charges beyond a reasonable doubt.[11]

A judge is not entitled to notice of charges until after the judicial disciplinary body has determined what those charges are.[12] Additionally, a judge need not be permitted to present testimony or other evidence at a preliminary determination as to whether probable cause exists to initiate formal disciplinary charges.[13]

CUMULATIVE SUPPLEMENT

Cases:

Judge's right to due process at second of two judicial disciplinary proceedings was not violated by any lag time between disciplinary panel's receipt of second complaint, appointment of examiner, and notifying of judge that second investigation was being made; rule governing initiation of investigation allowed panel to initiate investigation on its own motion and required that the judge be contacted "during the investigation," with panel having appointed examiner within a few weeks after receiving second complaint and notified judge of additional charges. U.S. Const. Amend. 14; Kan. Sup. Ct. R. 609. Matter of Henderson, 392 P.3d 56 (Kan. 2017).

Any error in admitting evidence regarding where District Court judge had resided in past as evidence of other bad acts did not prejudice judge, and thus did not violate due process, in judicial discipline proceedings regarding whether judge failed to reside in his judicial district during part of later year, where panel did not rely on facts about where judge lived in past when it determined he did not reside in his judicial district in later year. U.S.C.A. Const.Amend. 14; 50 M.S.A., Rules of Evid., Rule 404(b). In re Conduct of Pendleton, 870 N.W.2d 367 (Minn. 2015).

Chief Justice of the Supreme Court of Appeals had, for purposes of due process in impeachment proceedings, a property interest in obtaining her pension when she chooses to retire. U.S. Const. Amend. 14. State ex rel. Workman v. Carmichael, 819 S.E.2d 251 (W. Va. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Mo.—In re Voorhees, 739 S.W.2d 178 (Mo. 1987).

2 Ark.—Arkansas Judicial Discipline and Disability Com'n v. Proctor, 2010 Ark. 38, 360 S.W.3d 61 (2010).
Cal.—Oberholzer v. Commission on Judicial Performance, 20 Cal. 4th 371, 84 Cal. Rptr. 2d 466, 975 P.2d 663 (1999).
Fla.—In re Cohen, 99 So. 3d 926 (Fla. 2012).
La.—In re McInnis, 769 So. 2d 1186 (La. 2000).
Minn.—In re Conduct of Karasov, 805 N.W.2d 255 (Minn. 2011).
Nev.—Jones v. Nev. Comm'n on Jud. Discipline, 318 P.3d 1078, 130 Nev. Adv. Op. No. 11 (Nev. 2014).
Or.—State ex rel. Currin v. Commission on Judicial Fitness and Disability, 311 Or. 530, 815 P.2d 212 (1991).
S.D.—In re Fuller, 2011 SD 22, 798 N.W.2d 408 (S.D. 2011).
Tex.—Matter of Carrillo, 542 S.W.2d 105 (Tex. 1976).
Utah—In re Worthen, 926 P.2d 853 (Utah 1996).

Vt.—In re O'Dea, 159 Vt. 590, 622 A.2d 507 (1993).

3 Ark.—Arkansas Judicial Discipline and Disability Com'n v. Proctor, 2010 Ark. 38, 360 S.W.3d 61 (2010).
Cal.—McComb v. Commission On Judicial Performance, 138 Cal. Rptr. 459, 564 P.2d 1 (Cal. 1977).
Fla.—In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997).
Minn.—In re Conduct of Karasov, 805 N.W.2d 255 (Minn. 2011).
Nev.—Jones v. Nev. Comm'n on Jud. Discipline, 318 P.3d 1078, 130 Nev. Adv. Op. No. 11 (Nev. 2014).
Tex.—Matter of Carrillo, 542 S.W.2d 105 (Tex. 1976).

4 Fla.—In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997).
Ga.—Matter of Inquiry Concerning a Judge, 265 Ga. 843, 462 S.E.2d 728 (1995).
Minn.—In re Conduct of Karasov, 805 N.W.2d 255 (Minn. 2011).
Nev.—Jones v. Nev. Comm'n on Jud. Discipline, 318 P.3d 1078, 130 Nev. Adv. Op. No. 11 (Nev. 2014).

5 Fla.—In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997).

6 Cal.—Kloepfer v. Commission On Judicial Performance, 49 Cal. 3d 826, 264 Cal. Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235 (1989).
Fla.—In re Graham, 620 So. 2d 1273 (Fla. 1993).
Ky.—Alred v. Com., Judicial Conduct Com'n, 395 S.W.3d 417 (Ky. 2012), reh'g denied and opinion modified, (Oct. 25, 2012).
La.—In re McInnis, 769 So. 2d 1186 (La. 2000).
Mich.—In re Chrzanowski, 465 Mich. 468, 636 N.W.2d 758 (2001).
Miss.—Mississippi Com'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).
Nev.—Mosley v. Nevada Com'n on Judicial Discipline, 117 Nev. 371, 22 P.3d 655 (2001).
R.I.—In re Commission on Judicial Tenure and Discipline, 916 A.2d 746 (R.I. 2007).
Utah—In re Anderson, 2004 UT 7, 82 P.3d 1134 (Utah 2004).

7 Kan.—In re Platt, 269 Kan. 509, 8 P.3d 686 (2000).
Wis.—Matter of Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

Where judicial review available

Cal.—McComb v. Commission On Judicial Performance, 138 Cal. Rptr. 459, 564 P.2d 1 (Cal. 1977).

8 U.S.—Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971).
La.—In re McInnis, 769 So. 2d 1186 (La. 2000).
Mich.—Matter of Jenkins, 437 Mich. 15, 465 N.W.2d 317 (1991).
Minn.—In re Gillard, 271 N.W.2d 785 (Minn. 1978).

9 U.S.—Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972).
La.—In re Haggerty, 257 La. 1, 241 So. 2d 469 (1970).

10 Mich.—In re Heideman, 387 Mich. 630, 198 N.W.2d 291 (1972).
N.H.—In re Case of Snow, 140 N.H. 618, 674 A.2d 573 (1996).
Wash.—In re Disciplinary Proceeding Against Sanders, 159 Wash. 2d 517, 145 P.3d 1208 (2006).

11 Cal.—McComb v. Commission On Judicial Performance, 138 Cal. Rptr. 459, 564 P.2d 1 (Cal. 1977).
Minn.—In re Gillard, 271 N.W.2d 785 (Minn. 1978).

12 Conn.—In re Flanagan, 240 Conn. 157, 690 A.2d 865 (1997).

13 Fla.—In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997).

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16D C.J.S. Constitutional Law § 2113

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

b. Property Interests

§ 2113. Due process considerations with regard to property interests in employment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4175

A constitutionally protected property interest in public employment may be created by a legitimate claim of entitlement to the employment.

Property interests in public employment, to be constitutionally recognized, must arise out of legitimate claims of entitlement to the employment[1] rather than out of a unilateral expectation that the employment will continue.[2] Such interests may stem from sources such as federal[3] or state[4] law, in the form of statutes,[5] rules or regulations,[6] or ordinances;[7] from employment contracts,[8] whether express or implied;[9] from personnel policies[10] as stated in personnel manuals[11] and handbooks;[12] or from other rules and understandings,[13] such as the employer and employee's mutual recognition of the entitlement[14] or the unwritten "common law" of a particular institution.[15] However, the entitlement to procedure alone does not create a procedural due process property interest in continued public employment.[16] Likewise, the fact that statutes grant civil service applicants the right to appeal adverse decisions does not create a property interest protectable by federal due process.[17]

Tenure.

Tenured public employees are generally held to have property interests in their employment.[18] Provisions allowing public employment terminations for cause only also give public employees a constitutionally protected property interest in their employment.[19]

A state employee has no property interest in a grant of tenure.[20]

Employment contract for specific term.

Property interests subject to constitutional due process protections may also be created by public employment contracts for a specified length of time[21] or by a 30-day notice of termination provision.[22] However, an employee working under a contract for a specified term generally has no property right to continued employment beyond the duration of the contract.[23]

At-will employees.

Constitutionally protected property interests do not ordinarily attach to public employment subject to termination at will by the employer,[24] or to employment which is by its terms provisional,[25] temporary,[26] or probationary[27] although under some authority a public employee may have a protected property interest in a status as a probationary appointee.[28] Independent contractors have no property interest in their continued public employment;[29] however, the liberty interest in being free from reputational harm coupled with harm to some more tangible interests such as employment is not limited to government employees and also extends to independent contractors for the government.[30]

Applicants for positions.

A property interest in a particular position in public employment is not created by a mere application for the position.[31] Likewise, successful completion of a civil service examination does not create a property interest in appointment to the position for which the applicant has applied,[32] and the appearance of an applicant's name on a list of eligibles for a particular position does not create a property right to be appointed to that position.[33] Moreover, an offer of public employment, prior to actual employment in a particular position, creates an expectancy only, as opposed to a protected property interest, so the failure to employ an individual who has been offered a job does not constitute a taking of property without due process of law.[34]

Employment obtained by misrepresentation.

Constitutionally protected property interests are not implicated in public employment which is obtained by misrepresentation[35] or violation of law.[36]

CUMULATIVE SUPPLEMENT

Cases:

Female former police officer who was allegedly removed from her job without any kind of process following return for maternity leave sufficiently alleged the existence of a protected property right in continued employment under Pennsylvania's Police

Tenure Act, as required to state a procedural due process claim against township and related officials under the Fourteenth Amendment, by alleging that she was a full time police officer in township's police department, and that township was a township of the second class. U.S. Const. Amend. 14; 53 P.S. § 812. Toth v. Bethel Township, 268 F. Supp. 3d 725 (E.D. Pa. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); McDonald v. Wise, 769 F.3d 1202 (10th Cir. 2014).
D.C.—Burton v. Office of Employee Appeals, 30 A.3d 789 (D.C. 2011).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
N.J.—J.E. on Behalf of G.E. v. State, Dept. of Human Services, Div. of Developmental Disabilities, 131 N.J. 552, 622 A.2d 227 (1993).
W. Va.—West Virginia Dept. of Environmental Protection v. Falquero, 228 W. Va. 773, 724 S.E.2d 744 (2012).

2 U.S.—Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Mulvenon v. Greenwood, 643 F.3d 653, 269 Ed. Law Rep. 46 (8th Cir. 2011); Zwygart v. Board of County Com'rs of Jefferson County, Kan., 483 F.3d 1086 (10th Cir. 2007).
Minn.—Phillips v. State, 725 N.W.2d 778, 215 Ed. Law Rep. 1084 (Minn. Ct. App. 2007).
N.H.—Short v. School Administrative Unit No. 16, 136 N.H. 76, 612 A.2d 364, 77 Ed. Law Rep. 317 (1992).
W. Va.—Hupp v. Sasser, 200 W. Va. 791, 490 S.E.2d 880, 121 Ed. Law Rep. 382 (1997).
No property interest where employee did not request change of status
County employees' assertion that they should have been categorized as classified employees under Tennessee law who were entitled to Fourteenth Amendment due process protections at termination did not create a property interest in their positions that would warrant due process protection, where they were not hired pursuant to procedures bestowing classified status upon an employee but were appointed, and they held their positions for many years without requesting a change of status.
U.S.—Kizer v. Shelby County Government, 649 F.3d 462 (6th Cir. 2011).

3 U.S.—Johnson v. City Council of Green Forest, Ark., 545 F. Supp. 43 (W.D. Ark. 1982).

4 U.S.—Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); McDonald v. Wise, 769 F.3d 1202 (10th Cir. 2014).
Del.—Stanford v. State Merit Employee Relations Bd., 44 A.3d 923 (Del. 2012).
D.C.—Burton v. Office of Employee Appeals, 30 A.3d 789 (D.C. 2011).
N.H.—Short v. School Administrative Unit No. 16, 136 N.H. 76, 612 A.2d 364, 77 Ed. Law Rep. 317 (1992).
N.J.—J.E. on Behalf of G.E. v. State, Dept. of Human Services, Div. of Developmental Disabilities, 131 N.J. 552, 622 A.2d 227 (1993).

5 Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Me.—Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267 (Me. 1984).
W. Va.—West Virginia Dept. of Environmental Protection v. Falquero, 228 W. Va. 773, 724 S.E.2d 744 (2012).

6 Pa.—Hasinecz v. Com., Pennsylvania State Police, 100 Pa. Commw. 622, 515 A.2d 351 (1986).
S.D.—Lee v. South Dakota Dept. of Health, 411 N.W.2d 108 (S.D. 1987).

7 U.S.—Wilson v. Robinson, 668 F.2d 380 (8th Cir. 1981).

8 U.S.—Ridpath v. Board of Governors Marshall University, 447 F.3d 292, 209 Ed. Law Rep. 32 (4th Cir. 2006).
Me.—Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267 (Me. 1984).
Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).
Wyo.—Bear v. Volunteers of America, Wyoming, Inc., 964 P.2d 1245 (Wyo. 1998).
Valid contract for definite term

U.S.—Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987).

Collective bargaining agreements

U.S.—Winston v. U.S. Postal Service, 585 F.2d 198 (7th Cir. 1978).

Alaska—Storrs v. Municipality of Anchorage, 721 P.2d 1146 (Alaska 1986).

Neb.—Ashby v. Civil Service Com'n of Douglas County, 241 Neb. 988, 492 N.W.2d 849 (1992).

Vt.—In re Gregoire, 166 Vt. 66, 689 A.2d 431 (1996).

Wash.—Danielson v. City of Seattle, 108 Wash. 2d 788, 742 P.2d 717 (1987).

9 U.S.—Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

Cal.—Figueroa v. Housing Authority, 131 Cal. App. 3d 528, 182 Cal. Rptr. 497 (1st Dist. 1982).

Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).

Wash.—Danielson v. City of Seattle, 108 Wash. 2d 788, 742 P.2d 717 (1987).

W. Va.—Hupp v. Sasser, 200 W. Va. 791, 490 S.E.2d 880, 121 Ed. Law Rep. 382 (1997).

10 Cal.—Figueroa v. Housing Authority, 131 Cal. App. 3d 528, 182 Cal. Rptr. 497 (1st Dist. 1982).

Me.—Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267 (Me. 1984).

11 U.S.—Serafin v. City of Lexington, Neb., 547 F. Supp. 1118 (D. Neb. 1982), aff'd, 716 F.2d 909 (8th Cir. 1983).

12 U.S.—Thomas v. Ward, 529 F.2d 916 (4th Cir. 1975); Paige v. Harris, 584 F.2d 178 (7th Cir. 1978).

N.D.—Livingood v. Meece, 477 N.W.2d 183 (N.D. 1991).

13 U.S.—Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Halfhill v. Northeast School Corp., 472 F.3d 496, 215 Ed. Law Rep. 251 (7th Cir. 2006).

Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

W. Va.—Hupp v. Sasser, 200 W. Va. 791, 490 S.E.2d 880, 121 Ed. Law Rep. 382 (1997).

14 Me.—Lynch v. Lewiston School Committee, 639 A.2d 630, 90 Ed. Law Rep. 271 (Me. 1994).

Miss.—Roberts v. Troutt, 475 So. 2d 421 (Miss. 1985).

Wyo.—City Council of Laramie v. Kreiling, 911 P.2d 1037 (Wyo. 1996).

15 U.S.—Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

16 U.S.—Bennett v. City of Boston, 869 F.2d 19 (1st Cir. 1989).

Tex.—County of Dallas v. Wiland, 216 S.W.3d 344 (Tex. 2007).

Notice and opportunity to be heard

U.S.—Schwartz v. Mayor's Committee on Judiciary of City of New York, 816 F.2d 54 (2d Cir. 1987).

Revocation of security clearance

U.S.—Hill v. Department of Air Force, 844 F.2d 1407 (10th Cir. 1988).

17 N.Y.—Deas v. Levitt, 73 N.Y.2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086 (1989).

18 U.S.—Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010); Hesse v. Town of Jackson, Wyo., 541 F.3d 1240 (10th Cir. 2008).

Cal.—DeYoung v. Commission on Professional Competence of the Hueneme Elementary School District, 228 Cal. App. 4th 568, 175 Cal. Rptr. 3d 383, 307 Ed. Law Rep. 348 (2d Dist. 2014).

Kan.—McMillen v. U.S.D. No. 380, Marshall County, Kan., 253 Kan. 259, 855 P.2d 896, 84 Ed. Law Rep. 528 (1993).

Ky.—Miller v. Administrative Office of Courts, 361 S.W.3d 867 (Ky. 2011).

La.—Richard v. Lafayette Fire and Police Civil Service Bd., 8 So. 3d 509 (La. 2009).

Mass.—Harris v. Board of Trustees of State Colleges, 405 Mass. 515, 542 N.E.2d 261, 55 Ed. Law Rep. 247 (1989).

Mich.—State Employees Ass'n v. Department of Mental Health, 421 Mich. 152, 365 N.W.2d 93 (1984).

Mo.—Byrd v. Board of Curators of Lincoln University of Missouri, 863 S.W.2d 873, 86 Ed. Law Rep. 1105 (Mo. 1993).

Ohio—Clipps v. Cleveland, 187 Ohio App. 3d 577, 2010-Ohio-2343, 932 N.E.2d 980 (8th Dist. Cuyahoga County 2010).

Pa.—Bethel Park School Dist. v. Bethel Park Federation of Teachers, Local 1607, 55 A.3d 154, 286 Ed. Law Rep. 598 (Pa. Commw. Ct. 2012), appeal denied, 619 Pa. 681, 62 A.3d 380 (2013).

S.C.—Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62, 121 Ed. Law Rep. 1174 (1997).
Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).
Tex.—County of Dallas v. Wiland, 216 S.W.3d 344 (Tex. 2007).
Wash.—Danielson v. City of Seattle, 108 Wash. 2d 788, 742 P.2d 717 (1987).
W. Va.—Barazi v. West Virginia State College, 201 W. Va. 527, 498 S.E.2d 720, 125 Ed. Law Rep. 992 (1997).
Wis.—Patterson v. Board of Regents of University of Wisconsin System, 119 Wis. 2d 570, 350 N.W.2d 612, 18 Ed. Law Rep. 420 (1984).

19 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Ala.—Fowler v. Johnson, 961 So. 2d 122 (Ala. 2006).
Alaska—Grimmett v. University of Alaska, 303 P.3d 482, 294 Ed. Law Rep. 1000 (Alaska 2013).
Conn.—Bartlett v. Krause, 209 Conn. 352, 551 A.2d 710 (1988).
Ga.—Thomas v. Lee, 286 Ga. 860, 691 S.E.2d 845 (2010).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Kan.—McMillen v. U.S.D. No. 380, Marshall County, Kan., 253 Kan. 259, 855 P.2d 896, 84 Ed. Law Rep. 528 (1993).
Mo.—Belton v. Board of Police Com'rs of Kansas City, 708 S.W.2d 131 (Mo. 1986).
N.C.—Peace v. Employment Sec. Com'n of North Carolina, 349 N.C. 315, 507 S.E.2d 272 (1998).
Tenn.—Bailey v. Blount County Bd. of Educ., 303 S.W.3d 216, 254 Ed. Law Rep. 420 (Tenn. 2010).
Tex.—County of Dallas v. Wiland, 216 S.W.3d 344 (Tex. 2007).
Utah—Becker v. Sunset City, 2013 UT 51, 309 P.3d 223 (Utah 2013).
Wis.—Milwaukee Dist. Council 48 v. Milwaukee County, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (2001).

20 Miss.—Wicks v. Mississippi Valley State University, 536 So. 2d 20, 50 Ed. Law Rep. 1337 (Miss. 1988).

21 U.S.—Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 2 Ed. Law Rep. 366 (9th Cir. 1982).
Tenn.—Bailey v. Blount County Bd. of Educ., 303 S.W.3d 216, 254 Ed. Law Rep. 420 (Tenn. 2010).
Wyo.—Town of Upton v. Whisler, 824 P.2d 545 (Wyo. 1992).

22 Alaska—Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

23 Colo.—Hadley v. Moffat County School Dist. RE-1, 681 P.2d 938, 17 Ed. Law Rep. 1219 (Colo. 1984).
Me.—Cook v. Lisbon School Committee, 682 A.2d 672, 113 Ed. Law Rep. 317 (Me. 1996).
Mont.—Schaal v. Flathead Valley Community College, 272 Mont. 443, 901 P.2d 541, 103 Ed. Law Rep. 438 (1995).
N.D.—Stensrud v. Mayville State College, 368 N.W.2d 519, 25 Ed. Law Rep. 551 (N.D. 1985).

24 U.S.—Perkins v. Board of Directors of School Administrative Dist. No. 13, 686 F.2d 49, 6 Ed. Law Rep. 303 (1st Cir. 1982); White v. Mississippi State Oil and Gas Bd., 650 F.2d 540, 8 Fed. R. Evid. Serv. 1100 (5th Cir. 1981).
Ala.—Williams v. Walker, 526 So. 2d 576 (Ala. 1988).
Alaska—Okpik v. City of Barrow, 230 P.3d 672 (Alaska 2010).
Ark.—Sullivan v. Coney, 2013 Ark. 222, 427 S.W.3d 682 (2013).
D.C.—Grant v. District of Columbia, 908 A.2d 1173 (D.C. 2006).
Idaho—Arnzen v. State, 123 Idaho 899, 854 P.2d 242 (1993).
Iowa—Davis v. Horton, 661 N.W.2d 533 (Iowa 2003).
Me.—Cook v. Lisbon School Committee, 682 A.2d 672, 113 Ed. Law Rep. 317 (Me. 1996).
Md.—Elliott v. Kupferman, 58 Md. App. 510, 473 A.2d 960 (1984).

25 U.S.—Bennett v. City of Boston, 869 F.2d 19 (1st Cir. 1989); Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972).

26 U.S.—Elkin v. Roudebush, 564 F.2d 810 (8th Cir. 1977); Jacobs v. Kunes, 541 F.2d 222 (9th Cir. 1976).
N.J.—Grexa v. State, Dept. of Human Services, 168 N.J. Super. 202, 402 A.2d 938 (App. Div. 1978).
Wash.—Jordan v. City of Oakville, 106 Wash. 2d 122, 720 P.2d 824 (1986).

27 Ala.—Ex parte Craft, 727 So. 2d 55, 133 Ed. Law Rep. 286 (Ala. 1999).
Me.—Lynch v. Lewiston School Committee, 639 A.2d 630, 90 Ed. Law Rep. 271 (Me. 1994).

Nev.—Eureka County School Dist. Bd. of Trustees v. Holbo, 101 Nev. 372, 705 P.2d 640, 27 Ed. Law Rep. 583 (1985).

Ohio—State ex rel. Rose v. Ohio Dept. of Rehab. & Corr., 91 Ohio St. 3d 453, 2001-Ohio-95, 746 N.E.2d 1103 (2001).

Okla.—Oklahoma Public Employees Ass'n v. Oklahoma Military Dept., 2014 OK 48, 330 P.3d 497 (Okla. 2014).

Wis.—Kraus v. City of Waukesha Police and Fire Com'n, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294 (2003).

Clearing one's name

A probationary employee may be entitled to a posttermination due process name-clearing hearing where the public employer creates and disseminates a false and defamatory impression about the employee in connection with termination.

N.Y.—Wilcox v. Newark Valley Cent. School Dist., 107 A.D.3d 1127, 967 N.Y.S.2d 432, 293 Ed. Law Rep. 1017 (3d Dep't 2013).

28 U.S.—Marvin v. King, 734 F. Supp. 346 (S.D. Ind. 1990).

W. Va.—State ex rel. Dickerson v. City Of Logan, 221 W. Va. 1, 650 S.E.2d 100 (2006).

Interest in previous position

Public university employee had property interests in both wages which were commensurate with position he held prior to his probationary promotion and in continuous employment within that position.

Wis.—Arneson v. Jezwinski, 225 Wis. 2d 371, 592 N.W.2d 606, 134 Ed. Law Rep. 336 (1999).

29 Ky.—Romero v. Administrative Office of Courts, 157 S.W.3d 638 (Ky. 2005), as modified, (Mar. 21, 2005).

30 U.S.—Jones v. McNeese, 746 F.3d 887 (8th Cir. 2014).

31 U.S.—Brown v. Bi-State Development Agency, 449 F. Supp. 46 (E.D. Mo. 1978); Jackson v. Nassau County Civil Service Commission, 424 F. Supp. 1162 (E.D. N.Y. 1976).

Kan.—Padilla v. City of Topeka, 238 Kan. 218, 708 P.2d 543 (1985).

Pa.—Mansfield v. State Civil Service Com'n (Dept. of Labor and Industry), 68 A.3d 1062 (Pa. Commw. Ct. 2013).

Wis.—Taplick v. City of Madison Personnel Bd., 97 Wis. 2d 162, 293 N.W.2d 173 (1980).

32 U.S.—Saraceno v. City of Utica, 733 F. Supp. 538 (N.D. N.Y. 1990).

Iowa—Rinard v. Polk County, 516 N.W.2d 822 (Iowa 1994).

N.Y.—Andriola v. Ortiz, 82 N.Y.2d 320, 604 N.Y.S.2d 530, 624 N.E.2d 667 (1993).

33 U.S.—Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

34 U.S.—National Treasury Emp. Union v. Reagan, 509 F. Supp. 1337, 32 Fed. R. Serv. 2d 1149 (D.D.C. 1981).

Probationary employee

Me.—Lynch v. Lewiston School Committee, 639 A.2d 630, 90 Ed. Law Rep. 271 (Me. 1994).

Antidiscrimination statute

A statute prohibiting the denial of employment on the basis of an applicant's criminal record, unless certain conditions were met, did not give an applicant who had a criminal record a due process-protected property interest in a position with a city agency.

U.S.—Cancel v. New York City Human Resources Administration/Department of Social Services, 527 Fed. Appx. 42 (2d Cir. 2013).

35 U.S.—Kekai v. Hargrave, 649 F.2d 748 (9th Cir. 1981).

N.Y.—Prasad v. Merges, 65 A.D.2d 663, 409 N.Y.S.2d 815 (3d Dep't 1978).

36 U.S.—Robinson v. Civil Service Commission, 445 F. Supp. 94 (S.D. N.Y. 1977).

Alaska—Degnan v. Bering Strait School Dist., 753 P.2d 146, 46 Ed. Law Rep. 759 (Alaska 1988).

Miss.—Tillmon v. Mississippi State Dept. of Health, 749 So. 2d 1017 (Miss. 1999).

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Constitutional Law
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§ 2114. Due process considerations with regard to property interests in employment—Suspension, demotion, resignation, and mandatory retirement

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4172(1) to 4172(4), 4172(6)

Public employees who may only be suspended or demoted "for cause" possess a constitutionally protected property interest in their employment which precludes their suspension or demotion without compliance with procedural due process requirements.

Public employees who may only be suspended "for cause" have a constitutionally protected property interest in their employment[1] which precludes their suspension without compliance with procedural due process requirements.[2] A suspension of sufficient magnitude may constitute a de facto dismissal,[3] giving the suspended employee procedural due process rights,[4] but due process is not required where the disciplinary measures imposed are minor[5] or where the state has a significant interest in immediately suspending the employee.[6]

Suspension of a public employee with pay does not deprive the employee of a property right.[7]

Demotion.

The general rule is that no property interest protected by the Due Process Clause is implicated when a public employer reassigns or transfers an employee absent a specific statutory provision or contract term to the contrary.[8] If a public employee has a protected property interest in employment in a particular position, that employee cannot be terminated or demoted without due process;[9] however, a public employee generally does not have a protected property interest in a particular position, thus, a demotion does not violate due process.[10]

If a statute or regulation places substantive restrictions on the discretion to demote a public employee, such as providing that discipline may only be imposed for cause, then a property interest is created.[11] Public employees who are subject to demotion for cause only may not be demoted for a reason so inadequate that it may be characterized as arbitrary or capricious.[12] As demotions or downgrading reclassifications from positions in which employees have a property interest are analogous to dismissals,[13] they also require compliance with procedural due process protections.[14] However, the demotion of probationary or provisional public employees who lack a constitutionally protected property interest in their employment is not subject to due process requirements.[15] A public employee who is demoted with no loss of pay or job title has no claim that due process rights were violated because the employee was not granted a hearing before the demotion.[16]

A police officer may be owed due process when being demoted; thus, a police staff sergeant was entitled to due process in connection with a demotion down to sergeant where a city charter clearly required reasonable notice and an opportunity for a hearing.[17] On the other hand, police officers had no protected property interest in their ranks under state law, and demotions without hearings did not violate their procedural due process rights.[18]

Voluntary resignation.

Voluntary resignations from public employment preclude claims of infringement of property[19] and liberty[20] interests and of denials of due process,[21] in connection with events leading up to the resignations, as the employee has suffered no deprivation at the hands of the state.[22] The resignation of a public employee is involuntary, and thus may be a deprivation of property for due process purposes, where it is obtained by the employer's misrepresentation or deception, or forced by employer's duress or coercion.[23] If the due process claim is based on the employer's misrepresentation, the misrepresentation must be one of material fact concerning the resignation—that is, it must concern either the consequences of resignation or an alternative to resignation.[24] If the claim was based on duress, it must appear that the employer's conduct in requesting the employee's resignation effectively deprived the employee of free choice in the matter.[25] Factors to be considered are whether the employee was (1) given some real alternative to resignation, (2) understood nature of choice, (3) was given a reasonable time in which to choose, and (4) was permitted to select the effective date of resignation.[26] The question is not whether the employee's working conditions had become difficult or unpleasant but whether the working conditions were so intolerable that a reasonable person would feel compelled to resign.[27]

Mandatory retirement.

Provisions requiring the retirement from public service of employees who attain a specified age have been upheld as against assertions that they violate constitutional due process guaranties,[28] as they have been found not to implicate any constitutionally

protected property rights[29] but to be rationally related to legitimate legislative purposes[30] without creating irrebuttable presumptions of unfitness at a particular age.[31]

CUMULATIVE SUPPLEMENT

Cases:

Two types of public employee involuntary resignation amount to termination that may form basis for a Fourteenth Amendment procedural due process claim: constructive discharge and coerced resignation. U.S. Const. Amend. 14. Ulrey v. Reichhart, 941 F.3d 255 (7th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Krause v. Small Business Administration, 502 F. Supp. 1332 (S.D. N.Y. 1980); Moore v. Tulsa, 55 F. Supp. 3d 1337 (N.D. Okla. 2014).
Ala.—Mitchell v. Greenough, 295 Ala. 165, 325 So. 2d 158 (1976).
N.Y.—Palermo v. Eisenberg, 81 Misc. 2d 1014, 367 N.Y.S.2d 378 (Sup 1975).
Wyo.—Mondt v. Cheyenne Police Dept., 924 P.2d 70 (Wyo. 1996).

2 U.S.—Onweiler v. U.S., 432 F. Supp. 1226 (D. Idaho 1977); Miller v. Baltimore City Bd. of School Com'rs, 833 F. Supp. 2d 513, 280 Ed. Law Rep. 193 (D. Md. 2011).
Cal.—Wilkerson v. City of Placentia, 118 Cal. App. 3d 435, 173 Cal. Rptr. 294 (4th Dist. 1981).
Mich.—Montiy v. Civil Service Bd. of City of East Detroit, 54 Mich. App. 510, 221 N.W.2d 248 (1974).
W. Va.—Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1977).

3 U.S.—Gniotek v. City of Philadelphia, 808 F.2d 241 (3d Cir. 1986).

4 U.S.—Gniotek v. City of Philadelphia, 808 F.2d 241 (3d Cir. 1986) (30-day suspension without pay and with intention to dismiss).

5 Ind.—City of Crown Point v. Knesek, 499 N.E.2d 261 (Ind. 1986) (due process did not require judicial review of city's imposition of reprimands and one-week suspension on police officers).
Full evidentiary hearing not required before suspension
Mass.—Matter of Ellis, 425 Mass. 332, 680 N.E.2d 1154 (1997).
Reprimand and one-week suspension
Ind.—City of Crown Point v. Knesek, 499 N.E.2d 261 (Ind. 1986).
No due process protections for two-day unpaid suspension
U.S.—Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985).

6 U.S.—Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997) (lost income relatively insubstantial).

7 Conn.—Hunt v. Prior, 236 Conn. 421, 673 A.2d 514 (1996).
Me.—Pratt v. Ottum, 2000 ME 203, 761 A.2d 313 (Me. 2000).
Md.—City of Annapolis v. Rowe, 123 Md. App. 267, 717 A.2d 976 (1998).
N.M.—Board of Educ. of Carlsbad Mun. Schools v. Harrell, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511, 94 Ed. Law Rep. 966 (1994).

8 U.S.—Lauck v. Campbell County, 627 F.3d 805 (10th Cir. 2010).

9 U.S.—Faghri v. University of Connecticut, 621 F.3d 92, 261 Ed. Law Rep. 62 (2d Cir. 2010).
Sufficient claim of deprivation of liberty interest
A discharged police officer's allegations that a city reinstated the officer to a civilian position and effectively excluded the officer from the trade or calling of a police officer are sufficient to state a claim that the officer

suffered a significant demotion and was thus was deprived of a liberty interest in the officer's reputation and occupation in violation of due process rights.

U.S.—Hall v. City of Newport News, 469 Fed. Appx. 259 (4th Cir. 2012).

10 U.S.—Clark v. City of Oakland, 385 Fed. Appx. 665 (9th Cir. 2010).

D.C.—Burton v. Office of Employee Appeals, 30 A.3d 789 (D.C. 2011).

11 Okla.—Barnthouse v. City of Edmond, 2003 OK 42, 73 P.3d 840 (Okla. 2003).

12 Ind.—Natural Resources Commission of Dept. of Natural Resources v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981).

13 Cal.—Ng v. State Personnel Bd., 68 Cal. App. 3d 600, 137 Cal. Rptr. 387 (3d Dist. 1977).

14 U.S.—Winkler v. DeKalb County, 648 F.2d 411 (5th Cir. 1981).

Ala.—Peseau v. Civil Service Bd. of Tuscaloosa County, 385 So. 2d 1310 (Ala. Civ. App. 1980).

Ind.—Natural Resources Commission of Dept. of Natural Resources v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981).

15 U.S.—Davis v. Nuss, 432 F. Supp. 44 (S.D. Tex. 1977).

Pa.—Skowronski v. Governor's Council on Drug and Alcohol Abuse, 28 Pa. Commw. 236, 368 A.2d 852 (1977).

16 U.S.—Harris v. City of Montgomery, 322 F. Supp. 2d 1319, 189 Ed. Law Rep. 721 (M.D. Ala. 2004).

17 U.S.—Hatley v. City of Charlotte, 826 F. Supp. 2d 890 (W.D. N.C. 2011).

18 U.S.—Aldridge v. City of Memphis, 404 Fed. Appx. 29 (6th Cir. 2010); Kirk v. City of Kokomo, 772 F. Supp. 2d 983 (S.D. Ind. 2011).

19 U.S.—Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981).

20 U.S.—Lyons v. Sullivan, 602 F.2d 7 (1st Cir. 1979); Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988).

21 U.S.—Christie v. U. S., 207 Ct. Cl. 333, 518 F.2d 584 (1975).

22 U.S.—Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988).

23 U.S.—Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988).

24 U.S.—Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988).

25 U.S.—Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988); Walsh v. Cuyahoga County, 424 F.3d 510, 2005 FED App. 0799N (6th Cir. 2005).

26 U.S.—Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 (4th Cir. 1988); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).

27 U.S.—Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).

28 U.S.—Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977); Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980).

Mo.—O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).

N.H.—Grinnell v. State, 121 N.H. 823, 435 A.2d 523 (1981).

No hearing required

R.I.—Power v. City of Providence, 582 A.2d 895 (R.I. 1990).

29 U.S.—Black v. Payne, 591 F.2d 83 (9th Cir. 1979).

Mass.—McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 322 N.E.2d 758 (1975).

Mo.—O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).

N.Y.—Nurenberg v. Ward, 51 A.D.2d 1022, 381 N.Y.S.2d 412 (2d Dep't 1976).

30 U.S.—Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980).

Haw.—Daoang v. Department of Ed., 63 Haw. 501, 630 P.2d 629 (1981).

Mo.—O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).

Rescission of decision to retire

A town did not violate a police chief's procedural due process rights by failing to provide him with a hearing prior to suspending him with pay, in response to his 11th-hour change of heart in purporting to rescind his announced retirement on the date that his successor was to assume control of police force. The need to preserve clear chain-of-command in the department was an extraordinary circumstance that

warranted dispensing with a predeprivation hearing, and the town provided its suspended chief with sufficient postdeprivation opportunity to be heard.

U.S.—McCarthy v. Darman, 372 Fed. Appx. 346 (3d Cir. 2010).

31 U.S.—Talbot v. Pyke, 533 F.2d 331 (6th Cir. 1976); Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974).

State judges

U.S.—Trafelet v. Thompson, 594 F.2d 623 (7th Cir. 1979).

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16D C.J.S. Constitutional Law § 2115

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§ 2115. Due process considerations with regard to property interests in pensions and disability benefits

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4172(5)

Benefits provided by retirement systems of public employees, including disability benefits, have been recognized as property interests to which due process protections are applicable.

Pensions and other legitimate retirement expectations of public employees may constitute property rights[1] of which a person may not be deprived without due process of law.[2] Compulsory contributions to a public employees' retirement system do not constitute an unconstitutional deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment.[3]

Disability retirement benefits, provided under a retirement system for public employees, constitute a property interest to which due process protections are applicable[4] and claimants for such benefits whose claims are disputed are entitled to notice,[5] a hearing,[6] the assistance of retained counsel,[7] an impartial forum,[8] adequate findings,[9] an opportunity to rebut harmful evidence prior to the discontinuation of benefits,[10] and judicial review.[11] It has also been held, however, that the denial of a claim

for disability benefits which is not preceded by a trial-type hearing does not violate due process requirements where the determination made with respect to eligibility is reliable,[12] no questions of witness credibility or veracity are likely to arise,[13] and no clear showing is made that an adversary hearing could be of value to the claimant.[14]

Footnotes

1 Conn.—Pineman v. Oechslin, 195 Conn. 405, 488 A.2d 803 (1985).
Me.—Spiller v. State, 627 A.2d 513, 84 Ed. Law Rep. 320 (Me. 1993).
Vt.—Preston v. Burlington City Retirement System, 194 Vt. 147, 2013 VT 56, 76 A.3d 615 (2013).
Wis.—Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 544 N.W.2d 888 (1996).
Wyo.—Peterson v. Sweetwater County School Dist. No. One, 929 P.2d 525, 115 Ed. Law Rep. 116 (Wyo. 1996).

2 U.S.—Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976).
Cal.—Davis v. Commission On Judicial Qualifications, 73 Cal. App. 3d 818, 141 Cal. Rptr. 75 (2d Dist. 1977).
Conn.—Pineman v. Oechslin, 195 Conn. 405, 488 A.2d 803 (1985).
Ill.—Peacock v. Board of Trustees of Police Pension Fund, 395 Ill. App. 3d 644, 335 Ill. Dec. 159, 918 N.E.2d 243 (1st Dist. 2009).
Mass.—Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 680 N.E.2d 45 (1997).

3 U.S.—Grossman v. Gilchrist, 519 F. Supp. 173 (N.D. Ill. 1981), aff'd, 676 F.2d 701 (7th Cir. 1982).

4 U.S.—Basciano v. Herkimer, 605 F.2d 605 (2d Cir. 1978).
D.C.—McNeal v. Police and Firefighters' Retirement and Relief Bd., 488 A.2d 931 (D.C. 1985).
N.Y.—Park v. Kapica, 8 N.Y.3d 302, 832 N.Y.S.2d 885, 864 N.E.2d 1284 (2007).
Vt.—Preston v. Burlington City Retirement System, 194 Vt. 147, 2013 VT 56, 76 A.3d 615 (2013).
W. Va.—Stull v. Firemen's Pension and Relief Fund of City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998).

5 Ill.—Peacock v. Board of Trustees of Police Pension Fund, 395 Ill. App. 3d 644, 335 Ill. Dec. 159, 918 N.E.2d 243 (1st Dist. 2009).
Kan.—Neeley v. Board of Trustees, Policemen's and Firemen's Retirement System, City of Wichita, 205 Kan. 780, 473 P.2d 72 (1970).
W. Va.—Stull v. Firemen's Pension and Relief Fund of City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998).

6 Haw.—Mortensen v. Board of Trustees of Employees' Retirement System, 52 Haw. 212, 473 P.2d 866 (1970).
Md.—Quesenberry v. Washington Suburban Sanitary Com'n, 311 Md. 417, 535 A.2d 481 (1988).
N.Y.—McCabe v. Board of Trustees of Police Pension Fund of City of New York, Article 2, 56 Misc. 2d 329, 288 N.Y.S.2d 538 (Sup 1968).
Vt.—Preston v. Burlington City Retirement System, 194 Vt. 147, 2013 VT 56, 76 A.3d 615 (2013).
Wash.—O'Connor v. Washington Law Enforcement Officers' and Fire Fighters' Retirement Bd., 21 Wash. App. 296, 584 P.2d 492 (Div. 2 1978).
W. Va.—Stull v. Firemen's Pension and Relief Fund of City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998).

7 N.Y.—McCabe v. Board of Trustees of Police Pension Fund of City of New York, Article 2, 56 Misc. 2d 329, 288 N.Y.S.2d 538 (Sup 1968).
W. Va.—Stull v. Firemen's Pension and Relief Fund of City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998).

8 N.Y.—Alhmeyer v. New York State Policemen's and Firemen's Retirement System, 82 A.D.2d 954, 440 N.Y.S.2d 772 (3d Dep't 1981).
Pa.—Kreiger v. City of Philadelphia, Bd. of Pensions and Retirement, 47 Pa. Commw. 131, 408 A.2d 170 (1979).

Delegation of responsibility

When decision making is required to be made or approved by designated official, that official may not delegate ultimate decision making responsibility.

Md.—Quesenberry v. Washington Suburban Sanitary Com'n, 311 Md. 417, 535 A.2d 481 (1988).

9 Wis.—State ex rel. Ruthenberg v. Annuity and Pension Bd. of City of Milwaukee, 89 Wis. 2d 463, 278 N.W.2d 835 (1979).

10 Ill.—Peacock v. Board of Trustees of Police Pension Fund, 395 Ill. App. 3d 644, 335 Ill. Dec. 159, 918 N.E.2d 243 (1st Dist. 2009).

11 La.—Werner v. Board of Trustees of New Orleans Police Pension Fund of City of New Orleans, 360 So. 2d 615 (La. Ct. App. 4th Cir. 1978).

12 U.S.—Basciano v. Herkimer, 605 F.2d 605 (2d Cir. 1978).

13 U.S.—Siletti v. New York City Emp. Retirement System, 401 F. Supp. 162 (S.D. N.Y. 1975), aff'd, 556 F.2d 559 (2d Cir. 1977).

14 U.S.—Siletti v. New York City Emp. Retirement System, 401 F. Supp. 162 (S.D. N.Y. 1975), aff'd, 556 F.2d 559 (2d Cir. 1977).

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§ 2116. Due process considerations with regard to property interests involving employment promotions and reassignments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4168, 4171 to 4175

Constitutional due process protections do not apply with regard to promotions of public employees who, under governing civil service standards and procedures, lack a constitutionally protected property interest in their employment and in the position to which they seek to be promoted.

Constitutional due process protections are applicable to public employees' interests in promotions to the extent that such interests are cognizable under statutes and regulations[1] or contracts[2] but do not apply with regard to promotions of public employees who, under governing civil service standards and procedures, lack a constitutionally protected property interest in their employment[3] or in the position to which they seek to be promoted.[4]

Tests as the basis for promotion do not violate due process so long as the tests are rationally related to the legitimate governmental interest of delivering quality services and do not violate public employees' equal protection rights. Thus, when temporary

promotions are rescinded to make room for the appointment of applicants with higher scores, no due process interest is violated.[5] There is no due process violation in failing to promote candidates who are at the top of a roster for positions, where such ranking only entitles employees to be considered for a promotion, but does not entitle them to a promotion; employees lack a protected property interest in fair and unbiased promotional examinations, and thus, procedures used by an employer to promote those who do not take the exam do not violate their due process rights.[6] However, where a collective bargaining agreement provides a public employee with discretion to hire any candidate certified to the promotional list, an employee passed over for promotion to after achieving the highest score on a promotional examination does have a property interest in being promoted, protected by the Due Process Clause.[7]

Even if a public employee has a property interest in a position based upon statutory or contractual language, such an interest is not abridged by nondisciplinary personnel actions such as restructuring of a department for budgetary reasons.[8]

Applying a veteran's preference statute to promotions, as well as to initial hiring, does not create a due process or equal protection violation.[9]

Reassignment.

Constitutionally protected property interests are not implicated in the reassignment of a public employee to another position[10] or location[11] except where the reassignment is for improper reasons.[12]

CUMULATIVE SUPPLEMENT

Cases:

Police sergeant lacked protected due process property interest in promotion within police department or fair examination for such promotion. U.S. Const. Amend. 14. Word v. City of Chicago, 946 F.3d 391 (7th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Koscherak v. Schmeller, 363 F. Supp. 932 (S.D. N.Y. 1973), judgment aff'd, 415 U.S. 943, 94 S. Ct. 1462, 39 L. Ed. 2d 560 (1974).
Md.—Andre v. Montgomery County Personnel Bd., 37 Md. App. 48, 375 A.2d 1149 (1977).
N.J.—Cunningham v. Department of Civil Service, 69 N.J. 13, 350 A.2d 58 (1975).

2 U.S.—Kizas v. Webster, 492 F. Supp. 1135, 29 Fed. R. Serv. 2d 1004 (D.D.C. 1980), judgment aff'd, 707 F.2d 524 (D.C. Cir. 1983).

3 U.S.—Grossman v. Schwartz, 514 F. Supp. 421 (S.D. N.Y. 1981), aff'd, 679 F.2d 872 (2d Cir. 1981).
Promotional examination
City procedures and standards for civil service employment did not create a property interest protected under Fourteenth Amendment; thus, promotional examination used by city did not violate right of assistant city attorneys to due process of the law.
U.S.—LaGrange v. City of Minneapolis, 645 F.2d 615 (8th Cir. 1981).

4 U.S.—Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985).
Ga.—Ellison v. DeKalb County, 236 Ga. App. 185, 511 S.E.2d 284 (1999).
Md.—Andre v. Montgomery County Personnel Bd., 37 Md. App. 48, 375 A.2d 1149 (1977).

Mass.—Bielawski v. Personnel Adm'r of Div. of Personnel Admin., 422 Mass. 459, 663 N.E.2d 821 (1996).
Ohio—Shirokey v. Marth, 63 Ohio St. 3d 113, 585 N.E.2d 407 (1992).
Where promotion depends on discretion of supervisor
Wyo.—Bachmeier v. Hoffman, 1 P.3d 1236 (Wyo. 2000).

5 U.S.—Fewer v. City and County of San Francisco, 240 Fed. Appx. 185 (9th Cir. 2007).

6 U.S.—Kaminski v. Township of Toms River, 595 Fed. Appx. 122 (3d Cir. 2014); Martin v. City of East Orange, 2009 WL 324187 (D.N.J. 2009).

7 Conn.—Honulik v. Town of Greenwich, 293 Conn. 698, 980 A.2d 880 (2009).

8 U.S.—Aldridge v. City of Memphis, 404 Fed. Appx. 29 (6th Cir. 2010).

9 Kan.—State ex rel. Slusher v. City of Leavenworth, 285 Kan. 438, 172 P.3d 1154 (2007).

10 U.S.—Grasso v. U.S., 535 F. Supp. 309 (E.D. Mo. 1982), aff'd, 716 F.2d 907 (8th Cir. 1983).
Judge
Pa.—In re Avellino, 547 Pa. 385, 690 A.2d 1138 (1997).

11 **FBI agents**
U.S.—Bullard v. Webster, 623 F.2d 1042 (5th Cir. 1980); Bramley v. Webster, 476 F. Supp. 351 (E.D. Pa. 1979).

12 U.S.—Perry v. Golub, 400 F. Supp. 409 (N.D. Ala. 1975).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

b. Property Interests

§ 2117. Due process considerations with regard to property interests in employment compensation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4175

Compensation due public employees is a constitutionally protected property right, but there is no general property right to a job at a particular rate of pay in public employment.

Compensation due public employees is a constitutionally protected property right[1] the nature of which may be determined by applicable statutory provisions and regulations.[2] However, there is no general property right to a job at a particular rate of pay in public employment,[3] and a public employee has no property interest in a discretionary pay raise.[4] Due process is not violated by the imposition of pay lag, with deferred pay returned when the employee separates from service.[5]

Footnotes

1 U.S.—Sherlock v. U.S., 43 Ct. Cl. 161, 1907 WL 835 (1908).
Fla.—Hanchey v. State ex rel. Roberts, 52 So. 2d 429 (Fla. 1951).
Rank and compensation
Mo.—Belton v. Board of Police Com'rs of Kansas City, 708 S.W.2d 131 (Mo. 1986).
2 U.S.—Patternmakers League of North America v. Campbell, 619 F.2d 826 (9th Cir. 1980).
3 Colo.—Anderson v. Colorado State Dept. of Personnel, 756 P.2d 969 (Colo. 1988).
Me.—Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267 (Me. 1984).
4 Wyo.—City Council of Laramie v. Kreiling, 911 P.2d 1037 (Wyo. 1996).
5 U.S.—Adams v. Suozzi, 517 F.3d 124 (2d Cir. 2008).

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16D C.J.S. Constitutional Law § 2118

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Constitutional Law
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§ 2118. Due process considerations with regard to property interests in employment in public office

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4175

Constitutionally protected property interests have been recognized with respect to public offices which are not terminable at will.

Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested, or property right in the office.[1] While public offices have generally not been viewed as property,[2] some courts have been willing to recognize property interests in public offices,[3] particularly where incumbents are to serve for a fixed period of time[4] and are removable only for cause[5] or upon the occurrence of specified events.[6]

As an appointment to a public office may be a matter of political privilege,[7] appointees to public offices generally lack a constitutionally protected property interest in their offices,[8] and even an unlawful denial by state action of a right to state political office has been held not to be a denial of a right of property to which constitutional due process guaranties are applicable.[9]

Generally, pertinent legislation and legislative intent determine whether appointed public officers have a property interest in their positions,[10] but while the absence of provisions allowing a discharge only for cause, or only in compliance with a certain procedure, is persuasive in deciding that an officer has no constitutionally protected property interest in an incumbency, it is not dispositive.[11] There is no right protected by due process to be considered for an appointed office.[12]

Elective office.

In some instance, elected public officers have been found to possess either a property interest[13] or an otherwise sufficiently recognizable interest[14] in their positions to require compliance with the fundamental requirements of due process.[15] However, it has also been held that a state officer's interest in an elected post is not property[16] and that the suspension of an elected public official without a prior hearing does not violate due process of law.[17]

In the context of the suspension and removal of elected officials, due process requires notice and an opportunity to be heard.[18] A proceeding resulting in the removal of an individual from elected public office must accord that individual due process of law.[19]

Abolition of offices.

The abolition of public offices by a legislature does not deprive their former incumbents of property without due process of law[20] as long as the abolition is not a colorable attempt to oust particular incumbents and to replace them with others.[21]

Political patronage positions.

In determining whether political patronage dismissals are constitutionally permissible or whether they violate the rights of political belief and association, the essential question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved.[22]

State judges.

State judges have protected due process interests in their judicial offices.[23] However, a judge appointed for a specific term has no property right in reappointment after the expiration of the term.[24]

Footnotes

1 N.Y.—Ballard v. Gromack, 47 Misc. 3d 802, 2 N.Y.S.3d 775 (Sup 2015).

2 U.S.—Taylor v. Beckham, 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900).
Ark.—Reaves v. Jones, 257 Ark. 210, 515 S.W.2d 201 (1974).
Del.—Slawik v. State, 480 A.2d 636 (Del. 1984).
Ga.—Ramsbottom Co. v. Bass/Zebulon Roads Neighborhood Ass'n, 273 Ga. 798, 546 S.E.2d 778 (2001).
Ohio—State ex rel. Battin v. Bush, 40 Ohio St. 3d 236, 533 N.E.2d 301 (1988).
Vt.—Brennan v. Town of Colchester, 169 Vt. 175, 730 A.2d 601 (1999).

3 U.S.—Gewertz v. Jackman, 467 F. Supp. 1047, 4 Fed. R. Evid. Serv. 816 (D.N.J. 1979); Kucinich v. Forbes, 432 F. Supp. 1101 (N.D. Ohio 1977).

Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

Mont.—State ex rel. Ryan v. Norby, 118 Mont. 283, 165 P.2d 302 (1946).

W. Va.—Simpson v. Stanton, 119 W. Va. 235, 193 S.E. 64 (1937).

4 Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

Tex.—Ridgway v. City of Fort Worth, 243 S.W. 740 (Tex. Civ. App. Fort Worth 1922), writ dismissed, (Oct. 2, 1922).

5 Ga.—Guy v. Nelson, 202 Ga. 728, 44 S.E.2d 775 (1947) (disapproved of on other grounds by, Collins v. Williams, 237 Ga. 576, 229 S.E.2d 388 (1976)).

Vt.—Emerson v. Hughes, 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 (1952).

6 Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

7 Kan.—Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975).

8 U.S.—Burks v. Perk, 470 F.2d 163, 66 Ohio Op. 2d 348 (6th Cir. 1972).

Kan.—Kennedy v. Board of County Com'rs of Shawnee County, 264 Kan. 776, 958 P.2d 637 (1998).

N.Y.—DeLucia v. Lefkowitz, 62 A.D.2d 674, 406 N.Y.S.2d 150 (3d Dep't 1978), order aff'd, 48 N.Y.2d 901, 424 N.Y.S.2d 897, 400 N.E.2d 1349 (1979).

Appointment void

County assessor did not have property right in continued occupancy of his position where, after expiration of assessor's term, assessor's status was only as holdover and assessor's subsequent appointment was void as it was not made in strict compliance with statute and administrative rules.

Iowa—Bailiff v. Adams County Conference Bd., 650 N.W.2d 621 (Iowa 2002).

9 U.S.—Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944).

S.C.—Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997).

10 U.S.—Young v. Brashears, 560 F.2d 1337 (7th Cir. 1977).

11 U.S.—Young v. Brashears, 560 F.2d 1337 (7th Cir. 1977).

Failure to file oaths

Minimal due process required that incumbent state corporation commissioner be afforded notice and opportunity to be heard before governor as appointing authority could declare vacancy due to incumbent's alleged failure to file required oaths.

Okla.—Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected, (Mar. 8, 1995).

12 Ga.—Ramsbottom Co. v. Bass/Zebulon Roads Neighborhood Ass'n, 273 Ga. 798, 546 S.E.2d 778 (2001).

13 U.S.—Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979); Tiraco v. New York State Bd. of Elections, 963 F. Supp. 2d 184 (E.D. N.Y. 2013).

Fla.—Richard v. Tomlinson, 49 So. 2d 798 (Fla. 1951).

Ga.—Northway v. Allen, 291 Ga. 227, 728 S.E.2d 624 (2012).

Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

14 Tex.—Tarrant County v. Ashmore, 635 S.W.2d 417 (Tex. 1982).

15 U.S.—Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), judgment aff'd, 401 U.S. 928, 91 S. Ct. 935, 28 L. Ed. 2d 210 (1971).

Mont.—Lovell v. Wolf, 197 Mont. 443, 643 P.2d 569 (1982).

W. Va.—Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 (1975).

16 Del.—Slawik v. State, 480 A.2d 636 (Del. 1984).

R.I.—Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).

17 U.S.—Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), judgment aff'd, 401 U.S. 928, 91 S. Ct. 935, 28 L. Ed. 2d 210 (1971); Miller v. Iowa State ASCS Committee, 374 F. Supp. 415 (S.D. Iowa 1974).

Probable cause determination

Fla.—Tenney v. State Commission on Ethics, 395 So. 2d 1244 (Fla. 2d DCA 1981).

18 Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).

19 N.C.—In re Cline, 749 S.E.2d 91 (N.C. Ct. App. 2013), review denied, 367 N.C. 293, 753 S.E.2d 781 (2014) and cert. denied, 135 S. Ct. 132, 190 L. Ed. 2d 100 (2014).

20 Ga.—Hussey v. Chatham County, 268 Ga. 871, 494 S.E.2d 510 (1998).
N.C.—Brown v. Board of Com'rs of Richmond County, 223 N.C. 744, 28 S.E.2d 104 (1943).
S.C.—State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625 (1936).

21 Tenn.—Baird v. Baird, 175 Tenn. 350, 134 S.W.2d 166 (1939).

22 U.S.—Nader v. Blair, 549 F.3d 953 (4th Cir. 2008).

23 Nev.—Mosley v. Nevada Com'n on Judicial Discipline, 117 Nev. 371, 22 P.3d 655 (2001).
N.C.—In re Inquiry Concerning a Judge, 356 N.C. 389, 584 S.E.2d 260 (2002).
R.I.—In re Advisory Opinion (Chief Justice), 507 A.2d 1316 (R.I. 1986).
Wyo.—Town of Upton v. Whisler, 824 P.2d 545 (Wyo. 1992).

24 U.S.—Schwartz v. Mayor's Committee on Judiciary of City of New York, 816 F.2d 54 (2d Cir. 1987).

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16D C.J.S. Constitutional Law § 2119

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

c. Liberty Interests

§ 2119. Due process liberty interest with regard to termination of employment in way causing stigma

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4171, 4173

A termination of public employment that wrongfully jeopardizes the employability or reputation of the affected individual implicates constitutionally protected liberty interests and requires the application of suitable procedural due process safeguards.

In order to invoke procedural due process protections, a public employee must show that a protected liberty or property interest is implicated.[1] A termination of public employment, in and of itself, does not impair any constitutionally protected liberty interest and does not, therefore, require compliance with procedural due process,[2] even if it makes the terminated employee less attractive to other employers[3] and the search for a new job more difficult.[4] A terminated public employee's constitutional liberty interests are not infringed where the reasons for the termination are not explained[5] or disclosed publicly,[6] or where a false statement merely offers an evaluation of an employee's work performance.[7]

The State deprives an individual of a protected due process liberty interest if it prevents the employee from continuing to work in an occupation generally open to similarly educated or experienced individuals.[8] If, in the course of subjecting an at-will employee to the present injury of termination, the State attaches to the employee a "badge of infamy" that impairs future employment opportunities, liberty interests under the Due Process Clause come into play.[9] A Fourteenth Amendment occupational liberty claim may arise when, after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning the employee's good name, honor, or reputation or imposes a stigma that forecloses other employment opportunities.[10]

Stigma-plus claims.

A cause of action in favor of a government employee for deprivation of a liberty interest without due process of law, commonly known as a "stigma-plus" claim,[11] may arise when an alleged government defamation occurs in the course of dismissal from government employment.[12] Under this theory, a public employee's liberty interests may be affected where the termination of employment is based on substantially false allegations,[13] which due to their disclosure to the public[14] at the time of dismissal[15] may wrongfully damage the terminated employee's employability,[16] or jeopardize the employee's reputation,[17] honor and integrity,[18] or community standing.[19] Thus, a public employee's liberty interests may be infringed even where the employer's allegedly stigmatizing charges do not jeopardize the future employability of the employee[20] and even when they relate to an employee who lacked a constitutionally protected property interest in the terminated employment.[21]

Damaging information placed in a terminated public employee's personnel file may affect constitutionally protected liberty interests[22] if it is likely to be made available to prospective employers,[23] but liberty interests are not implicated by charges against a terminated employee which are merely present in confidential files[24] that are not disclosed publicly.[25] Where the discharged employee is seeking only expungement of stigmatizing material in a personnel file and is not seeking reinstatement or damages, a likelihood of dissemination is sufficient to satisfy the publication requirement for the due process liberty interest in receiving a name-clearing hearing.[26]

CUMULATIVE SUPPLEMENT

Cases:

At-will, public employees generally have no liberty interest in continued employment for due process purposes, but an exception to this general rule exists where a state employer creates and disseminates a false and defamatory impression about the at-will employee in connection with the discharge. U.S. Const. Amend. 14. Correia v. Jones, 943 F.3d 845 (8th Cir. 2019).

There was no evidence that Central Intelligence Agency (CIA) impeded the transfer of the security clearance of a former covert contract CIA employee, or that it disseminated any adverse information to government contractors that were prospective employers regarding his security clearance, thus precluding former employee's claim, brought under a stigma or disability theory, that CIA and CIA Director violated his due process rights. U.S. Const. Amend. 5. Peter B. v. Central Intelligence Agency, 174 F. Supp. 3d 308 (D.D.C. 2016).

Former elementary school principal's name-clearing hearing constituted ample process and obviated her Fourteenth Amendment stigma-plus claim; she was provided with sufficient opportunity during hearings to refute all charges against her as well as defamatory claim she forged teacher's signature on evaluation form, but she and her counsel made strategic and tactical decision not to address that claim during her case. U.S. Const. Amend. 14. Damiano v. Scranton School District, 135 F. Supp. 3d 255, 329 Ed. Law Rep. 211 (M.D. Pa. 2015).

[END OF SUPPLEMENT]

Footnotes

1 D.C.—Burton v. Office of Employee Appeals, 30 A.3d 789 (D.C. 2011).

2 U.S.—Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974); Matthews v. Hesburgh, 504 F. Supp. 108 (D.D.C. 1980), aff'd, 672 F.2d 895 (D.C. Cir. 1981).
S.D.—Carlson v. Hudson, 277 N.W.2d 715 (S.D. 1979).

3 U.S.—Matthews v. Hesburgh, 504 F. Supp. 108 (D.D.C. 1980), aff'd, 672 F.2d 895 (D.C. Cir. 1981).
Alaska—Jurgens v. City of North Pole, 153 P.3d 321 (Alaska 2007).
Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

4 U.S.—Mervin v. F.T.C., 591 F.2d 821 (D.C. Cir. 1978).

5 W. Va.—Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985) (reasons for termination not explained).

6 U.S.—Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

7 Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).

8 N.H.—Petition of Preisendorfer, 143 N.H. 50, 719 A.2d 590 (1998).

9 Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

10 U.S.—Palka v. Shelton, 623 F.3d 447 (7th Cir. 2010).
Vt.—Herrera v. Union No. 39 School Dist., 181 Vt. 198, 2006 VT 83, 917 A.2d 923, 217 Ed. Law Rep. 598 (2006).

11 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).
Neb.—State v. Worm, 268 Neb. 74, 680 N.W.2d 151 (2004).

12 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).
Ill.—Lyon v. Department of Children and Family Services, 209 Ill. 2d 264, 282 Ill. Dec. 799, 807 N.E.2d 423, 187 Ed. Law Rep. 726 (2004).
Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

13 U.S.—Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); Vega v. Miller, 273 F.3d 460, 159 Ed. Law Rep. 500 (2d Cir. 2001).
Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).
Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).
Neb.—Myers v. Nebraska Equal Opportunity Com'n, 255 Neb. 156, 582 N.W.2d 362 (1998).
Okla.—Blanton v. Housing Authority of City of Norman, 1990 OK 38, 794 P.2d 412 (Okla. 1990).
Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

14 U.S.—Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); Vega v. Miller, 273 F.3d 460, 159 Ed. Law Rep. 500 (2d Cir. 2001); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Mo.—Belton v. Board of Police Com'rs of Kansas City, 708 S.W.2d 131 (Mo. 1986).
Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).
Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).
Okla.—Blanton v. Housing Authority of City of Norman, 1990 OK 38, 794 P.2d 412 (Okla. 1990).

15 U.S.—Segal v. City of New York, 459 F.3d 207, 212 Ed. Law Rep. 21 (2d Cir. 2006).

Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).

Need not be strictly contemporaneous

Publication of defamatory statements need not be strictly contemporaneous with termination from public employment to occur in course of termination, as required for statements to deprive employee of liberty interest.

U.S.—Renaud v. Wyoming Dept. of Family Services, 203 F.3d 723 (10th Cir. 2000).

16 U.S.—Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Cal.—California Teachers Ass'n v. State of California, 20 Cal. 4th 327, 84 Cal. Rptr. 2d 425, 975 P.2d 622, 138 Ed. Law Rep. 1147 (1999).

Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).

Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).

Kan.—Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984).

Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).

W. Va.—Wilhelm v. West Virginia Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

Foreclosure of other employment opportunities

Cal.—Katzberg v. Regents of University of California, 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339, 171 Ed. Law Rep. 513 (2002).

La.—Driscoll v. Stucker, 893 So. 2d 32 (La. 2005).

Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).

Miss.—Hall v. Board of Trustees of State Institutions of Higher Learning, 712 So. 2d 312, 127 Ed. Law Rep. 494 (Miss. 1998).

N.Y.—Lee TT. v. Dowling, 87 N.Y.2d 699, 642 N.Y.S.2d 181, 664 N.E.2d 1243 (1996).

Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

17 U.S.—Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).

Kan.—Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984).

Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

Vt.—Herrera v. Union No. 39 School Dist., 181 Vt. 198, 2006 VT 83, 917 A.2d 923, 217 Ed. Law Rep. 598 (2006).

18 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Lighton v. University of Utah, 209 F.3d 1213, 143 Ed. Law Rep. 753 (10th Cir. 2000).

Kan.—Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984).

Wash.—Jordan v. City of Oakville, 106 Wash. 2d 122, 720 P.2d 824 (1986).

19 U.S.—Crews v. Monarch Fire Protection Dist., 771 F.3d 1085 (8th Cir. 2014).

Idaho—Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).

Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).

Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

W. Va.—Wilhelm v. West Virginia Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

Wis.—Kraus v. City of Waukesha Police and Fire Com'n, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294 (2003).

20 U.S.—Dennis v. S & S Consolidated Rural High School Dist., 577 F.2d 338 (5th Cir. 1978).

21 U.S.—Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976).

As to property interests in public employment, see §§ 2113 to 2118.

22 U.S.—Segal v. City of New York, 459 F.3d 207, 212 Ed. Law Rep. 21 (2d Cir. 2006); Abelli v. Ansonia Bd. of Educ., 987 F. Supp. 2d 170, 306 Ed. Law Rep. 88 (D. Conn. 2013).

23 D.C.—Leonard v. District of Columbia, 794 A.2d 618 (D.C. 2002).

24 U.S.—Kaprelian v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975).

25 U.S.—Rose v. Eastern Nebraska Human Services Agency, 510 F. Supp. 1343 (D. Neb. 1981).

26 N.Y.—Swinton v. Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 (1999).

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Constitutional Law
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

c. Liberty Interests

§ 2120. Due process liberty interest with regard to termination of employment in way causing stigma—Particular allegations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4168, 4171, 4173(1) to 4175, 4188

A termination of public employment on the basis of allegations of dishonesty or immorality implicates constitutionally protected liberty interests, but courts have been divided as to the applicability of due process protections to terminations on the basis of allegations of incompetence, malfeasance, or insubordination.

Whether an employment dismissal is stigmatizing and implicates a due process liberty interest depends on the charge used as grounds for termination, not the actual consequence of the charge.[1]

Constitutionally protected liberty interests may be infringed by terminations of public employment on the basis of a terminated employee's alleged dishonesty or immorality,[2] mental unfitness,[3] emotional disturbance,[4] alcoholism[5] or intoxication at work,[6] racial prejudice[7] or insensitivity to minorities,[8] sexual harassment,[9] hostile work environment,[10] job related misconduct,[11] or allegations of criminal behavior.[12]

On the other hand, constitutionally protected liberty interests have been found not to be infringed by termination of public employment on the basis of the terminated employee's physical handicap[13] or injury,[14] excessive weight,[15] absenteeism,[16] participation in an improper strike,[17] running for political office,[18] involvement in partisan political activities,[19] loss of political patronage,[20] inability to get along with others,[21] or criminal indictment[22] or conviction,[23] or the employer's loss of confidence in the employee.[24] Nor are a public employee's liberty interests infringed where a termination occurs due to the bona fide elimination of the employee's job[25] for fiscal or budgetary reasons[26] or because the services of the employee are no longer needed.[27]

The liberty interests of public employees have been found not to be infringed by terminations on the basis of allegations of incompetence,[28] inefficiency,[29] or inadequacy,[30] but there is also authority to the contrary.[31] Charges of insubordination have been held not to involve liberty interests,[32] where they do not jeopardize the future employability of the terminated employee,[33] but there is authority to the contrary.[34]

CUMULATIVE SUPPLEMENT

Cases:

Letter from president of state university, stating that, if public employee's actions were later determined to constitute bad faith or willful misconduct, insurance coverage would not be available, was not stigmatizing, and therefore did not violate employee's Fourteenth Amendment liberty interest, since letter stopped far short of actually imputing bad faith, willful misconduct, intentional acts, waste, or fraud to employee. U.S. Const. Amend. 14. Kramer v. Cullinan, 878 F.3d 1156 (9th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Md.—Samuels v. Tschechtelin, 135 Md. App. 483, 763 A.2d 209, 149 Ed. Law Rep. 784 (2000).

2 U.S.—Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Blantz v. California Dept. of Corrections and Rehabilitation, Div. of Correctional Health Care Services, 727 F.3d 917 (9th Cir. 2013); Summers v. City of McCall, 2015 I.E.R. Cas. (BNA) 175363, 2015 WL 417763 (D. Idaho 2015).
D.C.—Leonard v. District of Columbia, 794 A.2d 618 (D.C. 2002).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).
Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).

3 U.S.—Lombard v. Board of Ed. of City of New York, 502 F.2d 631 (2d Cir. 1974); Fonville v. District of Columbia, 38 F. Supp. 3d 1 (D.D.C. 2014), appeal dismissed, (D.C.Circ. 14-7068) (Dec. 16, 2014).

4 U.S.—Blank v. Swan, 487 F. Supp. 452 (N.D. Ill. 1980).

5 U.S.—Dennis v. S & S Consolidated Rural High School Dist., 577 F.2d 338 (5th Cir. 1978); Duff v. Sherlock, 432 F. Supp. 423 (E.D. Pa. 1977).

6 U.S.—McKnight v. Southeastern Pennsylvania Transp. Authority, 583 F.2d 1229 (3d Cir. 1978).

7 U.S.—Wellner v. Minnesota State Jr. College Bd., 487 F.2d 153 (8th Cir. 1973); Fonville v. District of Columbia, 38 F. Supp. 3d 1 (D.D.C. 2014), appeal dismissed, (D.C.Circ. 14-7068) (Dec. 16, 2014).

Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).

8 U.S.—An-Ti Chai v. Michigan Technological University, 493 F. Supp. 1137 (W.D. Mich. 1980).

9 U.S.—Huff v. Butler County, 524 F. Supp. 751 (W.D. Pa. 1981).
N.Y.—Stanziale v. Executive Dept., Office of General Services, 77 A.D.2d 600, 429 N.Y.S.2d 919 (2d Dep't 1980), order aff'd, 55 N.Y.2d 735, 447 N.Y.S.2d 150, 431 N.E.2d 635 (1981).

10 U.S.—Willis v. City of Virginia Beach, 2015 I.E.R. Cas. (BNA) 177704, 2015 WL 1011542 (E.D. Va. 2015) (however, charges were not proven to have been made public).

11 U.S.—Dunkel v. Mt. Carbon/North Manheim Fire Co., 970 F. Supp. 2d 374 (M.D. Pa. 2013).
N.C.—Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

12 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Fonville v. District of Columbia, 38 F. Supp. 3d 1 (D.D.C. 2014), appeal dismissed, (D.C.Circ. 14-7068) (Dec. 16, 2014).
Iowa—Simonson v. Iowa State University, 603 N.W.2d 557, 140 Ed. Law Rep. 754 (Iowa 1999).
Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).
N.Y.—Swinton v. Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 (1999).

13 U.S.—Simon v. St. Louis County, Mo., 656 F.2d 316 (8th Cir. 1981).

14 U.S.—Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972).

15 Conn.—Millard v. Connecticut Personnel Appeal Bd., 170 Conn. 541, 368 A.2d 121 (1976).

16 U.S.—Rose v. Eastern Nebraska Human Services Agency, 510 F. Supp. 1343 (D. Neb. 1981).
Cal.—Williams v. Department of Water & Power, 130 Cal. App. 3d 677, 181 Cal. Rptr. 868 (2d Dist. 1982).

17 U.S.—Lake Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975).

18 U.S.—Hoch v. Fayette County, 541 F. Supp. 778 (W.D. Pa. 1982).

19 U.S.—Connealy v. Walsh, 412 F. Supp. 146 (W.D. Mo. 1976).

20 U.S.—Nunnery v. Barber, 503 F.2d 1349, 23 Fed. R. Serv. 2d 232 (4th Cir. 1974).

21 U.S.—Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 32 Fed. R. Serv. 2d 1369 (9th Cir. 1981).
Iowa—Anderson v. Low Rent Housing Commission of Muscatine, 304 N.W.2d 239 (Iowa 1981).
Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).

22 N.J.—Campbell v. Atlantic County Bd. of Freeholders, 145 N.J. Super. 316, 367 A.2d 912 (Law Div. 1976), judgment aff'd, 158 N.J. Super. 14, 385 A.2d 311 (App. Div. 1978).
N.Y.—DeLucia v. Lefkowitz, 62 A.D.2d 674, 406 N.Y.S.2d 150 (3d Dep't 1978), order aff'd, 48 N.Y.2d 901, 424 N.Y.S.2d 897, 400 N.E.2d 1349 (1979).

23 U.S.—Ybarra v. Bastian, 647 F.2d 891 (9th Cir. 1981).

24 Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).
W. Va.—Wilhelm v. West Virginia Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

25 U.S.—Nolan v. Ramsey, 597 F.2d 577 (5th Cir. 1979).
Conn.—Petrowski v. Norwich Free Academy, 199 Conn. 231, 506 A.2d 139, 31 Ed. Law Rep. 485 (1986).
D.C.—Hoage v. Board of Trustees of University of District of Columbia, 714 A.2d 776, 128 Ed. Law Rep. 1101 (D.C. 1998).

26 U.S.—Colon Velez v. Santiago de Hernandez, 440 F. Supp. 432 (D.P.R. 1977).
Wyo.—Deering v. Board of Directors of County Library of Fremont County, 954 P.2d 1359 (Wyo. 1998).

27 U.S.—Yeghiayan v. U. S., 227 Ct. Cl. 364, 649 F.2d 847 (1981).

28 U.S.—Blantz v. California Dept. of Corrections and Rehabilitation, Div. of Correctional Health Care Services, 727 F.3d 917 (9th Cir. 2013); Summers v. City of McCall, 2015 I.E.R. Cas. (BNA) 175363, 2015 WL 417763 (D. Idaho 2015).
Neb.—Potter v. Board of Regents of the University of Nebraska, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).
Nev.—State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002).

29 U.S.—Mervin v. F.T.C., 591 F.2d 821 (D.C. Cir. 1978).

Wash.—Giles v. Department of Social and Health Services, Indian Ridge Treatment Center, 90 Wash. 2d 457, 583 P.2d 1213 (1978).

30 U.S.—Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981).

Tenn.—Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351, 116 Ed. Law Rep. 503 (Tenn. 1996).

Poor work habits

U.S.—Stritzl v. U.S. Postal Service, 602 F.2d 249 (10th Cir. 1979).

31 U.S.—Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004).

D.C.—Leonard v. District of Columbia, 794 A.2d 618 (D.C. 2002).

N.Y.—Horowitz v. Roche, 70 A.D.2d 854, 417 N.Y.S.2d 700 (1st Dep't 1979).

32 U.S.—Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977).

33 N.C.—Nantz v. Employment Sec. Commission, 28 N.C. App. 626, 222 S.E.2d 474 (1976), judgment aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976).

Ohio—State ex rel. Trimble v. State Bd. of Cosmetology, 50 Ohio St. 2d 283, 4 Ohio Op. 3d 447, 364 N.E.2d 247 (1977).

W. Va.—Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1977).

34 U.S.—Swope v. Bratton, 541 F. Supp. 99 (W.D. Ark. 1982); Simmonds v. Government Emp. Service Commission, 10 V.I. 439, 375 F. Supp. 934 (D.V.I. 1974).

N.Y.—Lutwin v. Alleyne, 86 A.D.2d 670, 446 N.Y.S.2d 389 (2d Dep't 1982), order modified on other grounds, 58 N.Y.2d 889, 460 N.Y.S.2d 498, 447 N.E.2d 46 (1983).

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16D C.J.S. Constitutional Law § 2121

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XXII. Particular Applications of Due Process Guaranty

D. Occupation and Employment

2. Public Office and Employment

c. Liberty Interests

§ 2121. Due process liberty interest with regard to termination of employment in way causing stigma—Disclosures that may create stigma

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4164 to 4173(4), 4174, 4175, 4188

Constitutionally protected liberty interests may be implicated if an application for public employment is denied on the basis of publicly disclosed derogatory information that tarnishes the reputation and diminishes the employment opportunities of the applicant.

A denial of an application for public employment does not, in and of itself, infringe on constitutionally protected liberty interests[1] where the applicant is not stigmatized by it.[2] However, constitutionally protected liberty interests are implicated where an application for public employment is denied on the basis of publicly disclosed derogatory information[3] which tarnishes the reputation and diminishes the employment opportunities of the applicant.[4] Where liberty interests are implicated in the denial of an application for public employment, the applicant must be given notice and an opportunity to be heard.[5] It is not sufficient under such circumstances to merely allow the applicant to respond in writing to adverse information.[6]

Publication of the reasons for a public employee's demotion and transfer does not implicate protected liberty interests where the employee remains employed and suffers no damage to employment status as a result of the publication.[7]

Suspending a civilian employee's security clearance, creating a file showing the suspension, and disseminating the information does not so impugn the civilian employee's standing and reputation or limit the employee's ability to secure employment as to infringe a liberty interest.[8]

Constitutional due process requirements are not violated by a public announcement, prior to the filing of a complaint, that a judge is being investigated,[9] or by the interim suspension of a judge pending the final adjudication of a pending complaint.[10]

Footnotes

1 U.S.—Thompson v. Link, 386 F. Supp. 897 (E.D. Mo. 1974).

2 U.S.—Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976), opinion supplemented, 425 F. Supp. 984 (E.D. Mich. 1976).

3 U.S.—Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978); Doe v. U.S. Civil Service Commission, 483 F. Supp. 539 (S.D. N.Y. 1980).

4 U.S.—Doe v. U.S. Civil Service Commission, 483 F. Supp. 539 (S.D. N.Y. 1980).

5 U.S.—Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978); Doe v. U.S. Civil Service Commission, 483 F. Supp. 539 (S.D. N.Y. 1980).

6 U.S.—Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978).

7 U.S.—Johnson v. Morris, 903 F.2d 996 (4th Cir. 1990).

8 U.S.—Hill v. Department of Air Force, 844 F.2d 1407 (10th Cir. 1988).

9 Mich.—Matter of Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977).

10 U.S.—Gruenburg v. Kavanagh, 413 F. Supp. 1132 (E.D. Mich. 1976).
Liberty interests not affected
U.S.—Gruenburg v. Kavanagh, 413 F. Supp. 1132 (E.D. Mich. 1976).
Mich.—Matter of Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977).
Justices of the peace
U.S.—Roy v. Jones, 349 F. Supp. 315 (W.D. Pa. 1972), judgment aff'd, 484 F.2d 96 (3d Cir. 1973).
Pa.—In re Franciscus, 471 Pa. 53, 369 A.2d 1190 (1977).

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